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N. 2886

Nos. 14208-14218

In the
United States Court of Appeals
For the Ninth Circuit

WARREN E. TALCOTT, JR.,
Appellant,

vs.

COMMANDING OFFICER, et al.,
Appellees.

Appellant's Closing Brief

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WESTERN PRINTING COMPANY, WHITTIER

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In the
United States Court of Appeals
For the Ninth Circuit

WARREN E. TALCOTT, JR., *Appellant,* vs. COMMANDING OFFICER, et al., *Appellees.*	Nos. 14208-14218

Appellant's Closing Brief

Appellee's Brief deals with the subject matter involved in an order different than that in Appellant's Opening Brief and in three points instead of appellant's four.

This Closing Brief will use the Opening Brief's four headings and will try to deal with each of the arguments of appellee, indicating where they were made.

I.

A CLASSIFICATION BY A LOCAL BOARD IS INVALID WHEN NO CONSIDERATION HAS BEEN GIVEN TO THE EVIDENCE IN A REGISTRANT'S SELECTIVE SERVICE FILE.

Appellee's first attack on this point is that it is immaterial whether or not the board members consid-

ered the file on the theory that where a basis of fact exists in the file a denial of due process is immaterial. This is pre-Estep,* reasoning; today it is accepted that a denial of due process invalidates a classification even if a basis of fact should be present. See *United States v. Romano,* 103 F. Supp. 597, 601.

It is submitted that a registrant may always show a prejudicial illegality in his "classifying." Appellee's fears that if appellant is permitted to attack a classification by evidence that "the board members did not actually consider the file, there would never be an end to litigation in Selective Service cases" [Br. p. 19] are without any practical foundation. Never before, in reported selective service history has a registrant become armed, as this appellant has, with "confession" testimony on this point. See Appendix A. And whenever another registrant has such evidence available a trial court should welcome it.

This court itself has several times summed up appellant's point on the necessity of "consideration" and that the lack of it is fatal. In *Knox v. United States,* 200 F. 2d 398:

> "Classification by the Local Board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and acted upon by these local bodies the membership of which is composed of residents of his own community." [402]

Estep v. United States, 66 S. Ct. 423.

The same comment was made by Judge Stephens in one of the cases cited by appellee, *Sisquoc Ranch Co. v. Roth,* 153 F. 2d 437, at 440.

Appellee's next attack on this point is that "Appellant would not have sustained his offer of proof, as appellee was in possession of evidence to the contrary . . . " [Br. p. 19]. Appellant appends hereto, as Appendix A, an affidavit of counsel on this subject. It is to be observed that Appellant's proffer was based on a written statement on hand from the board members.

Contrary to appellee's assumption appellant's attempt to introduce this evidence was not for the purpose of showing the state of mind of the board members or their sympathies *but to show the facts concerning the classifying.* The point made by Judge Carter in *United States v. Alvies,* 112 F. Supp. 618 is applicable:

> "Where the record of selection service board action in classifying a registrant is questionable, presumptions are resolved in favor of the registrant. See *U. S. ex rel Reel v. Badt,* 2 Cir., 141 F. 2d 845[9]; *U. S. ex rel. Levy v. Cain,* 2 Cir. 149 F. 2d 338;[10] *United States v. Balogh,* 2 Cir., 157 F. 2d 939[11]; *United States v. Everngam, supra.*[12]" [624]

Appellee's final attack on this point is that the word "determination" in subsection (a) of Section 1626.2 does not refer to the same act as the word "classification" which occurs in the sentence 17 words previously.

With respect to whether or not a registrant may appeal from a IV-F classification the parties concede that subsection (a) of section 1626.2 applies but interpret it oppositely. Appellant believes that his interpretation, that no appeal is permitted, is the correct one because the single sentence regulation contains the word "except", which indicates that the subsequent clause describes an exception to the phrase "any classification". The regulation, with this word underlined, emphasizes the definite intent not to permit selective service appellate bodies to pass on conflicting medical and psychiatric testimony:

> "(a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board *except* that no such person may appeal from the determination of the registrant's physical or mental condition."

Appellee's attempt to separate the single sentence into two opposed and unrelated ideas is contrary to grammar, statutory draftsmanship, judicial interpretation and good sense. The regulations permit appeals *only* from *classifications.* The sole, permissible interpretation of the subsection (a) quoted is that appeals from IV-F classifications are not permitted.

Olinger v. Partridge, 106 F 2 986, cited by appellee to support the argument of waiver by reason of failure

to appeal is readily distinguishable because Olinger, after he received the appealable I-A classification did not appeal "and made no effort to appear to discuss his classification or to present new information to the draft board." [987] Talcott diligently did all these very things, after he received his I-A classification notice.

II.

THE IV-F CLASSIFICATION WAS ARBITRARY AND CONTRARY TO THE EVIDENCE THEN, OR AT ANY TIME, BEFORE THE BOARD. FOR THIS ADDITIONAL REASON IT CANNOT BE A BASIS FOR AN EXTENSION OF LIABILITY AND FOR A I-A CLASSIFICATION THAT IS MADE AFTER THE REGISTRANT PASSES HIS 26th BIRTH DATE.

To support the argument that a basis in fact existed for the IV-F classification appellee states:

> "Under State Director's Advice No. 55, issued by General Hershey, local boards were authorized to place in classification 4-F any registrant who had theretofore been rejected for service by the Armed Forces." [Br. p. 18]

Just what is "State Director's Advice No. 55"? It isn't a regulation, proclamation on anything to be found in the Federal Register. It is really only an interdepartmental communication and should never be used against a selective service registrant in a court

proceeding. This type of "office" law-making was struck down in *Ex Parte Barrial,* 101 F. Supp. 348. This type of office law-making is too frequently indulged in by both the Director and the various State Directors and the local boards are often led astray in adopting policies contrary to the Act and/or the regulations.

This practice was also criticized in *Ex parte Ghosh,* 50 F. Supp. 851:

> "The letter refers to a 'mimeographed statement' of October 23, 1943. This statement was in evidence. It is unsigned and bears no caption or designation either as a 'directive', 'order', 'memorandum to the local board', or any of the various other appellations given to the almost innumerable types of communications to local boards from state or national headquarters. It certainly was not a rule or regulation promulgated by the President or his delegee, the National Director of Selective Service. And the State Director is not empowered under the Act to promulgate rules or regulations nor to substitute his judgment for that of the local or appeal boards." [857]

Appellee, on page 25, bases still another argument on "Operations Bulletin No. 57." These advices, bulletins, and many others called "S.H.Q's", "Selective Service News" etc. are not available to registrants. Counsel has tried to have his name placed on the mailing list for them [they cannot be purchased from the Superintendent of Documents] but has repeatedly been

refused. Secret, interdepartmental communications should not be cited against a registrant.

Appellant knows of no cases on IV-F arbitrariness. The nearest judicial comment on it is in a 1952 decision that has come to counsel's attention while this Closing Brief was being written. Judge Wm. F. Riley anticipated Dickinson (as many others did) in *United States v. Brandt,* Cr. No. 1-227, S. D. Iowa, June 2, 1952:

> "Now as to anyone claiming to be a minister of religion, there is not any doubt in my mind that the duty devolves upon the draft board of deciding whether one claiming exemption on that ground is in reality a minister, just as they have the right to determine whether he falls into any other category—if 4-F they learn that through physical examination; if he is entitled to 4-E they learn that by testing the good faith of his claim to be exempt on account of his religious training and belief; and I don't believe that I have any right—in fact, I consider I have no right to review the action of the board with respect to the classification of ministers so long as there is any reasonable basis for the action of the board and so long as defendant is accorded a hearing." (Underscoring supplied.)

Copies of this decision will be handed to the Court during oral argument.

Judge Riley put his finger on the difference between fact and speculation. Appellee speculates that the notation in the file of the once-thought-to-be-punc-

tured eardrum is a basis in fact. Judge Riley and Talcott agree that a physical examination should have been made in 1950.

Appellant submits that there was no basis in fact for a IV-F classification until the physical examination was given him *in 1952.* It is to be remembered that, after he stated in the questionnaire (Ex. p. 10) "I feel that the condition of my eardrum should be clearly established," the board took no steps to do this and appellee's argument, that State Director's Advice No. 55J relieved the board from the necessity of discovering the fact of the case is met by *Dickinson's* requirement that the classification be based upon fact, not speculation concerning the "punctured" eardrum. This is so because, as everyone knows holes come in different sizes and a puncture sufficient to disqualify a naval officer candidate may be insufficient to disqualify a selective service selectee.

III.

THE LOCAL BOARD FRUSTRATED PETITIONER FROM SECURING AN IMPORTANT PROCEDURAL RIGHT, NAMELY, A PERSONAL APPEARANCE BEFORE THE LOCAL BOARD (WITH THE COROLLARY RIGHT TO AN APPEAL THEREAFTER SHOULD THE DECISION BE ADVERSE) ALTHOUGH HE HAD MADE A TIMELY, WRITTEN REQUEST. THIS WAS A DENIAL OF DUE PROCESS.

The parties are agreed that this point turns on the interpretation of the October 14, 1952 letter of appellant to the local board [Ex. pp. 25-28].

Subsequent to the printing of the Opening Brief appellant was apprised of a very recent decision interpreting a request similar to this appellant's:

In The United States District Court
For the Eastern District of Pennsylvania

UNITED STATES OF AMERICA,)
v.) Criminal
WILMER KRATZ DERSTINE.) No. 16715

OPINION

GRIM, J. March 30, 1954

After having waived a jury trial defendant was found guilty of refusing to submit to induction into the armed forces of the United States. He reported for induction as ordered, but upon completion of the processing at the induction station he refused to be inducted. He has filed a motion for judgment of acquittal averring, among other things, that he was not accorded the personal

hearing before his local Selective Service Board, to which he was entitled under the Selective Service Regulations.

The problem in the case was whether or not the defendant, a Mennonite, was entitled to a conscientious objector classification[1], which, if it had been granted, would have prevented his induction.

After the case had gone through all the Selective Service channels from the Local Board to the office of the National Director of Selective Service[2] with decisions always against the defendant registrant[3], the National Director made a written request to the Local Board that the classification be reopened and considered anew. See 32 C. F. R. 1625.3.

Following the request of the National Director the Local Board on September 13, 1951, reopened the classification and considered it anew but again refused the registrant a conscientious objector classification and put him again in 1-A. On September 14, 1951, defendant wrote a letter to the Local Board, which among other things, stated:

> "Today I received a new classification card 1-A from you as local Draft Board. . . . I do at this time want to present some new evidence and request either a hearing before the local board or *appeal* again to the Board

[1]When the proceedings started IV-E was the conscientious objector classification. The regulations were changed during the course of the proceedings so that now I-O is the conscientious objector classification.

[2]There was no appeal to the President, the registrant having been deprived of this right because the decision of the appeal board against the defendant's contention was unanimous. 32 C. F. R. 1627.3.

[3]The Hearing Examiner and the Department of Justice recommended that defendant be given a conscientious objector classification, but their recommendations were not followed by the selective service officials.

> of Appeals. . . . Upon this new evidence which I am submitting above, I hereby appeal to the Board of Appeals for a 4-E classification."

This letter was treated by the Local Board solely as an appeal to the Appeal Board and the case was referred to the Appeal Board. The request for a hearing was overlooked or ignored. The Appeal Board rejected the second appeal and again unanimously continued defendant in 1-A. The National Director of Selective Service upon application of the defendant again intervened and requested that defendant's selective service file be sent to him for further review. The file was sent to the National Director who after further consideration wrote to the State Director stating that he did not contemplate any further action in the case and directed that the processing of the defendant should proceed.

It is well established that the failure of a local draft board to accord a registrant a procedural right provided in the Selective Service Regulations invalidates the Board's action. *United States ex rel Berman v. Craig,* 207 F. 2d 888 (3rd Cir. 1953). *United States v. Stiles,* 169 F. 2d 455 (3rd Cir. 1948).

The Selective Service Regulations provide: (32 C. F. R. 1624.1)

> "*Opportunity to appear in person*: (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an oppor-

> tunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. . . . "

This regulation clearly gave defendant an opportunity, if he requested it in writing, to appear in person before his Local Board after he was given a 1-A classification on September 13, 1951. The fact that he had had a personal appearance before the Local Board on January 11, 1951, did not take away this right, since the regulations provide: (32 C. F. R. 1625.13)

> "*Right of appeal following reopening of classification.* Each such classification shall be followed by the same right of appearance as in the case of an original classification."

Defendant's request was not as clear as it might have been. He requested a "hearing" rather than an "opportunity to appear in person", but no one would seriously contend that a request for a hearing was not a request for an "opportunity to appear in person". A more serious defect in the request was that it did not definitely ask for a personal hearing, but instead it asked in the alternative either for a personal appearance or an appeal to the Appeal Board. Defendant said:

> "I do at this time want to present some new evidence and request either a hearing before the local board or *appeal* again to the Board of Appeals."

By using these words defendant in a sense left it to the judgment of the Local Board as to whether he should be given a personal appearance or whether his letter should be considered as an appeal to the Appeal Board. This apparently is the meaning which the Local Board took from his letter since it immediately referred the problem to the Appeal Board instead of giving defendant a hearing. *But defendant's request also had another meaning,* namely, that he requested an opportunity to appear in person before the Local Board, but if he had no such right or if after his appearance the decision should be against him, then he wanted to take an appeal to the Appeal Board. The second meaning of defendant's words is just as reasonable as is the meaning which the Local Board took from defendant's letter.

Registrants are "not to be treated as though they were engaged in formal litigation assisted by counsel." *United States ex rel Berman v. Craig, supra* at 891. Whenever a registrant in writing makes a request to a Local Board, no matter how ambiguously or unclearly the request is stated, if it indicates in any way a desire for a procedural right, the writing should be construed in favor of the registrant and the procedural right granted, or the registrant shoud be contacted by the Board to obtain clarification of what he had in mind when he made the request. The Local Board did not consider defendant's letter in this manner. It construed it as though defendant waived his right to have a personal appearance before the Board, and as meaning that defendant gave the Board the

choice of determining whether or not defendant should be given a personal appearance.[4]

There is no evidence that defendant followed up his request for a personal appearance by appearing uninvited at a local board meeting for the purpose of a personal appearance before it. In my opinion, he was not required to do this under the regulations. As a result of defendant's letter, the Local Board either should have asked defendant exactly what he wanted or it should have notified defendant that his request for a hearing before it had been granted, and it also should have told him when the Board would hold a meeting at which he could appear.

It is clear that the Local Board erred in not giving defendant a right to a personal appearance as a result of the request in his letter to it. This presents the question as to whether the error of the Local Board can be considered a harmless one which, under *Martin v. United States,* 190 F. 2d

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[4]The letter was worded very cleverly. It led this experienced and able Local Board into an error which is now being used as an argument to invalidate the selective service proceedings. Perhaps, if the request had not been in the alternative, and had been a clear request for a hearing, the Board would have followed the regulations and granted defendant a personal appearance, or at least it might have specifically denied defendant's request in such a way that th Appeal Board would have discovered the error and corrected it by ordering the Local Board to give defendant a personal hearing. But as the trier of the facts in this case I cannot say that the request was intentionally worded in the alternative with the hope that it would mislead the Local Board.

From the time the conscientious objector form (SSS 150) was applied for defendant was advised by Bishop John Lapp of the Mennonite Church. Bishop Lapp was an experienced, intelligent and resourceful advisor in this type of problem. Not only did he help defendant to fill out forms and write letters, but he also went with him to Washington to help him to state his case before the National Director of Selective Service. It is interesting to notice that under the regulations legal counsel may not appear with a registrant in his personal appearance before a Local Board, 32 C. F. R. 1624.1(b), but with the Board's permission advisers who are not lawyers may appear with registrants at the time of their personal appearance. It should be noted also that when defendant appealed to the Appeal Board he had a right to point out to the Appeal Board that his right to a personal appearance had been denied to him, 32 C. F. R. 1626.12. He did not do this.

775, did not invalidate the induction.[5] This is a serious problem in the case. The case was thoroughly contested as it went through the Local Board, the Appeal Board, the office of the State Director of Selective Service and the office of the National Director, and it is unlikely that anything would have been presented at a second personal appearance that had not already been presented with full emphasis on the important things to be considered. Consequently, it is unlikely that the error of the Local Board had any effect on the result of the case.

The right to appear personally before a local board is treated very seriously by the regulations. When a registrant makes a personal appearance before a local board, the Board must see that whatever new information it receives is summarized in writing and placed in the registrant's file. 32 C. F. R. 1624.2(b). If the registrant does not appear when he has been given an opportunity to do so this fact must be entered into the minutes of the Local Board. 32 C. F. R. 1624.2(a). After the registrant has made a personal appearance the Local Board must consider the classification problem anew and send to the registrant a written notice of the result of its new consideration of the case. 32 C.F.R. 1624.2(d). When a registrant is given a personal appearance this extends his time for an appeal so that the appeal time does not begin

[5]In the *Martin* case the registrant after a personal appearance before the Local Board was not given the written notice of the Board's refusal to change his classification to which he was entitled under the regulations. But the Board at the end of the hearing orally notified the registrant that it would not change his classification, and based on this oral notice the registrant filed an appeal within the proper time. It was clear that the fact that the registrant received oral rather than written notice of the Board's action in no way affected the result in the case.

to run until the time when the Local Board makes a decision in reference to the reclassification problem created by the personal appearance. 32 C. F. R. 1624.2(e). If a registrant does not speak English adequately he may bring an interpreter with him at the time of his personal appearance. 32 C. F. R. 1624.1(b).

It is important that a registrant be given an opportunity to appear in person before a Local Board. A pleader can almost always make a more effective presentation in the give and take of an argument in person than he can in writing. Many fine young men cannot express themselves well in writing, but they can do much better when they speak and are not so much concerned with their method of expression. It is particularly important that conscientious objector claimants be given an opportunity to appear in person. Their thoughts expressed in writing are often stereotyped and so subtle that they are very difficult to understand. Whether or not a registrant is truly a conscientious objector is pretty much a question of his sincerity, and sincerity, being a subjective problem, can be judged by a personal appearance better than it can by a written statement.

The defendant suggests a reason why in this case particularly he should have been given a right to a personal appearance when he requested it. The Federal Bureau of Investigation made an investigation in this case. The Hearing Examiner was given the F.B.I. report and summarized its contents in his report. The information in the F.B.I. report came from acquaintances and neighbors of defendant. Defendant was not given the

right to examine the F.B.I. report. Because of the summary of the F.B.I. report in the Hearing Examiner's report defendant knows substantially what was in it. He admits that most of it is correct, but he now denies some of it, and much of it is damaging to him. He contends that if he had been given a personal appearance before the Local Board he not only would have given it new information (which is unlikely) but also he would have denied some of the damaging information in the F.B.I. report.[6, 7]

The failure to grant defendant an opportunity to appear personally before the Local Board was a substantial error which invalidated the induction. He was denied a substantial procedural right to which he was entitled under the regulations. *United States v. Fry,* 203 F. 2d 638; *United States v. Stile,* 169 F. 2d 455. *United States ex rel Berman v. Craig, supra.*[8]

ORDER

AND NOW, March 30, 1954, in accordance with the foregoing opinion, defendant's motion for judgment of acquittal is hereby granted.

/s/ Allan K. Grim
J.

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[6]The F. B. I. report, among other things, included information to the effect that defendant belonged to a group of "hot-rodders" known as "Franconia cowboys", who lassoed mail boxes while they drove swiftly on public highways. Defendant contends that he would have denied this.

[7]The Hearing Examiner's report was thoughtful and thorough. In order to state the case properly the Examiner reviewed and summarized the information in the F. B. I. report. Although the Examiner's conclusion and recommendation were in defendant's favor, ironically his frank statement of the facts may have caused defendant considerable harm when the case was considered by the Appeal Board. The Hearing Examiner was Judge Curtis Bok of the Court of Common Pleas of Philadelphia.

[8]In this case the Court of Appeals for the Third Circuit decided, among other things, that an induction is invalid if a Local Board sends out an order to report for induction before ten days after a reclassification, because a registrant under the regulations is given ten days after a reclassification to request a personal appearance before the Local Board.

IV.

THE LOCAL BOARD FAILED TO REOPEN APPELLANT'S CLASSIFICATION, AND CLASSIFY HIM ANEW, WHEN HE PRESENTED THE STANDARD EVIDENCE SHOWING THAT HE WAS A FATHER, AND THEREFORE MANDATORILY ENTITLED TO A III-A CLASSIFICATION. THIS WAS A DENIAL OF DUE PROCESS.

Appellant argued that "The regulation setting a deadline is an alteration of the legislative intent. It defeats the intent of Congress." (Op. Br. pp. 32, at 36.)

Appellee's argument on the captioned point (Br. pp. 24-33) does not meet appellant's above-quoted argument directly. Appellant's choices of phraseology are singled out for scrutiny (Br. p. 24-); use is again made of a secret, interdepartmental bulletin (Br. p. 25) and cases appellant cited are "distinguished". The cases only require comment.

Appellee erroneously seeks to make a distinction between "deferments" and "exemptions" in rating the applicability of the cases cited by appellant. This error was doubtless induced by the fact that many decisions use the words interchangeably and particularly by the misuse of the word "exemption" in the *Clark* opinion.[1]. During the entire processing period of Clark [his refusal to submit to induction occurred on March 22, 1951] the conscientious objector classification sought (IV-E) was correctly termed a deferment. The Director of Selective Service says so. The following

[1]*United States v. Clark*, 105 F. Supp. 612.

is from Local Board Memorandum No. 38[2], issued October 30, 1951, signed "Lewis B. Hershey, Director.":

> *2. Liability Not Extended by Deferments Not Now Authorized by Law.*—Prior to June 19, 1951, section 6 required the deferment of conscientious objectors who were opposed to both combatant and non-combatant service in the armed forces and authorized the deferment of registrants who had wives with whom they maintained a bona fide family relationship in their homes. Section 6 was amended on June 19, 1951, by eliminating the provision requiring the deferment of conscientious objectors and by withdrawing from the President authority to provide for the deferment of registrants with wives alone, except in cases of extreme hardship. These two deferments, therefore, were not authorized by the law on and after June 19, 1951. Since the provisions of section 6 (h) extending liability to age thirty-five relate only to those "who are or may be deferred" under the provisions of section 6 on or after June 19, 1951, the deferments which would result in such extension of liability are only those which were authorized by law on June 19, 1951. Registrants who on or after June 19, 1951, were deferred in Class IV-E, or in Class III-A solely because of having wives with whom they maintained a bona fide family relationship in their homes (no hardship or other elements of dependency being involved), therefore, did not have their liability extended to age thirty-five.

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[2]The Superintendent of Documents furnishes Local Board Memoranda with a subscription to the Selective Service Regulations. He cannot take subscription for "Operation Bulletins" or any of the inter-departmental documents mentioned in the brief.

It is therefore evident that the reasoning in the *Clark* case should be considered applicable to appellant's argument on Point IV.

It should be noted that it is still another misconception to consider all deferments "discretionary" (Br. p. 32). As we pointed out (Op. Br. p. 32) the father's III-A deferred classification is mandatory, given the standard evidence. More "discretion" is involved in the determination of exemptions such as for "regular" minister, or for the I-O type conscientious objector than for the determination of deferments such as father's.

Appellee's argument on the other cases cited in Appellant's Opening Brief is that they involve different types of classifications and are therefore not applicable. Appellant stands by the particular use he has made of each and adds another:

> "In the light of the Supreme Court's decisions and the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Schuman v. United States,* 208 F 2 801, even though these are cases involving ministers, I think the same spirit of decision is applicable here." (Underscoring supplied.)
>
> *United States v. Titsuo Izumihara,* 120 F. Supp. 36, 40.

A writ should issue for the four reasons stated.

Respectfully,

J. B. TIETZ

Appendix

APPENDIX A

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
County of Los Angeles.—ss.

J. B. Tietz being first duly sworn states:

He was counsel for Warren E. Talcott, Jr. during all litigation involved in this matter;

That on October 13th and October 19, 1953 he had telephone conversations with Local Board Chairman Roger S. Marshall and Mr. Marshall said:

> "We didn't give individual attention to files in 1949; there was no pressure on us for men; no, we didn't see Talcott's file on or before January 23, 1950 nor did we have any facts before us on that date. When the board came into it we initialed it. This one we didn't initial because we didn't see the file."
>
> "I would like to read a statement in court that gives an explanation of our action. Mr. Hickson who is an attorney and has been on the board many years prepared it."

Affiant informed Mr. Marshall he desired a copy of the statement; that it might be acceptable as a stipulation.

That he received through the mail, the following letter:

October 21, 1953
RE: Warren Edward Talcott, Jr.
4 95 25 647

The undersigned members of LDB 95 have reviewed the file of Warren Edward Talcott Jr., and make the following statement of procedure at the time of his classification.

When this registrant was classified on January 23, 1950, no men were being inducted. Registrants were being classified as a clerical procedure where any grounds for a deferred classification was evident in the file. That is to say, that men, who had discharged military service, or were married, or claimed a physical defect, even if it were not verified by a doctor's letter, were placed in the respective classifications and the board initialed the minutes of these meetings without review of the files. This was true even of deferred classifications. Potential 1-A classifications were kept in a pool for board review.

The file reflects that at the time Talcott was classified, the SSS Form 112 shows that only automatic classifications were reported, therefore the board would not have reviewed these questionnaires personally, and no initials indicating such action is on the questionnaire when this classification was made. When the law, extending the liability of men was passed, Local Boards were instructed not to classify men into Class V-A who had passed their 26th birth date until an auditor from Southern Area would review and initial the files for extension. Talcott's file was reviewed and it is presumed that the notation in series XV

was not properly evaluated and the man was retained in IV-F and his liability extended as the cover sheet shows, by the initialing of the auditor.

Subsequent IV-F review ordered by National Headquarters, necessitated sending all men in that classification for physicals. This was done and he was found acceptable. Here the Local Board reclassified into 1-A, as his liability had been extended by the auditor. The 4-F review showed him physically acceptable for service, therefore he qualified for no other classification. His appeal of that classification was received and at that time the Local Board was of the opinion that he registered originally as a well man, and so stated in his file. However, at no place was there opportunity for re-classification at Local Board level without permission from State Headquarters. This permission was requested, and was denied, and Talcott was finally inducted in August 1953.

ROGER S. MARSHALL
MARSHALL HULSON

Sworn to before me and subscribed in my presence this 28 day of May, 1954 by J. B. Tietz, personally known to me.

s/ Edward Raiden
EDWARD RAIDEN
Notary Public.

Nos. 14208, 14218
Consolidated

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WARREN E. TALCOTT, JR.,

Appellant,

vs.

COMMANDING OFFICER, *et al.*,

Appellee.

APPELLEE'S BRIEF.

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WARREN E. TALCOTT, JR.,

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vs.

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Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The District Court has jurisdiction of the two successive Petitions for Writs of Habeas Corpus (Nos. 15813 and 15880 in the District Court, consolidated on appeal) [Tr. 3, 87], under provisions of Title 28, U. S. C., Section 2241 *et seq.*

This Court has jurisdiction of this consolidated appeal under the provisions of Title 28, U. S. C. 2253, the District Court having made and entered its Findings of Fact and Conclusions of Law in action No. 15813 [Tr. 19] and entered its Judgment denying a Petition for Writ of Habeas Corpus and dissolving Temporary Restraining Order on September 25, 1953 [Tr. 23], and

having made and entered its Judgment denying Petition for Writ of Habeas Corpus and disolving Temporary Restraining Order in action No. 15880 on October 29, 1953 [Tr. 109].

Statutes Involved.

Section 456(h) of the Selective Service Act of 1948 as amended June 19, 1951, now called Universal Military Training and Service Act (62 Stat. 604; 50 U. S. C. Appendix 451 *et seq.*), provides in part as follows:

> *"Section 456 Deferments and Exemptions From Training and Service.*
>
> (h) * * * The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the armed forces or from training in the National Security Training Corps (2) * * * of any or all categories of those persons found to be physically, mentally, or morally deficient or defective. * * *"

Said Section 456(h) also provides as follows:

> "* * * provided further, that *persons who are or may be deferred under the provisions of this section shall remain liable for training and service* in the armed forces or for training in the National Security Training Corps under the provisions of Section 4(a) of this Act (Section 454(a) of this Appendix) *until the thirty-fifth anniversary of the date of their birth.* This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferrable under any other provisions of this Act. * * *" (Emphasis supplied.)

Said Section 456(h) also provides as follows:

"* * * The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the armed forces or from training in the National Security Training Corps (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, * * *"

The Selective Service Rules and Regulations, issued by the President, pursuant to the Selective Service Act as amended, are contained in Title 32, Code of Federal Regulations (Rev. 1951), Chapter 16, Sections 1602 *et seq.* Sections 1623.1 and 1623.2 of the Selective Service Regulations, provide in part as follows:

"*Section 1623.1 Commencement of Classification.*

(a) Each registrant shall be classified as soon as practicable after his classification questionnaire (SSS Form No. 100) is received by the Local Board or as soon as practicable after the time allowed for him to return his classification questionnaire (SSS Form No. 100) has expired.

Section 1623.2 Consideration of Classes.

Every registrant shall be placed in Class 1-A under the provisions of Section 1622.10 of this Chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class 1-A-O considered the highest class and Class 1-C considered the lowest class according to the following table:"

* * * * * * * *

Section 1622.1 of the Selective Service Regulations provides in part as follows:

> *"Section 1622.1 General Principles of Classification.*
>
> (a) The Universal Military Training and Service Act as amended, provides that every male citizen of the United States, every other male person admitted to the United States for permanent residence, and every other male person who has remained in the United States in a status other than that of permanent resident for a period exceeding one year, who is between the ages of eighteen years and six months and twenty-six years, shall be liable for training and service in the armed forces of the United States, and that persons who on June 19, 1951, were or thereafter are, deferred under the provisions of Section 6 of such Act shall remain liable for training and service until they attain the age of thirty-five. * * *
>
> * * * * * * * *
>
> (c) It is the Local Board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility or deferment or exemption from military service is clearly established to the satisfaction of the Local Board. * * *"

Section 1622.30(c)(2), prior to December 19, 1952, read in part as follows:

> "No registrant shall be placed in Class III-A because he has a child which is not yet born unless, prior to the time the Local Board mails him an order to report for induction, there is filed with the Local Board the Certificate of a licensed physician stating that the child has been conceived. * * *"

Section 1622.30(c)(2) as amended December 19, 1952, reads as follows:

> "No registrant shall be placed in Class III-A because he has a child which is not yet born unless, prior to the time the Local Board mails him an order to report for induction, there is filed with the Local Board the Certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based."

Section 1622.10, Class I-A: Available for Military Service, reads in part as follows:

> "In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class."

Section 1625.1 and 2 reads in part as follows:

> *"1625.1 Classification Not Permanent.*
>
> (a) No classification is permanent.
>
> * * * * * * * *
>
> (c) The local Board shall keep informed of the status of classification registrants * * *"

> *"1625.2 When Registrant's Classification May Be Reopened and Considered Anew.*
>
> The Local Board may reopen and consider anew the classification of a registrant * * * provided, in either event, *the classification of a registrant shall not be reopened after the Local Board has mailed to such registrant an order to report for induction* (SSS Form 252) unless the Local Board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (Emphasis supplied.)

Section 1632.2(d) reads in part as follows:

> *"Section 1632.2 Postponement of Induction* * * *
>
> (d) A postponement of induction shall not render invalid the order to report for induction (SSS Form 252) which has been issued to registrant but shall operate only to postpone the reporting date and the registrant shall report on the new date without having issued to him a new order to report for induction (SSS Form 252)."

SSS Form 264, the notice of "Postponement of Induction" contains the following:

> "It is your continuous duty to report for induction upon the termination of this postponement and to report at such time and place as is fixed hereinabove or may hereafter be fixed by this Local Board."

Section 1622.60 of the Selective Service Regulations reads as follows:

> *"Section 1622.60 Director May Direct that Eligibility for Particular Classification be Disregarded.*
>
> The Director of Selective Service notwithstanding any other provisions of the regulations in this Chapter, may direct that any registrant shall be classified or re-classified without regard to his eligibility for a particular classification."

Section 1624.1 of the Rules and Regulations provides as follows:

> *"Section 1624.1 Opportunity to Appear in Person.*
> (a) Every registrant, after his classification is determined by the Local Board * * * shall have an opportunity to appear in person before the member or members of the Local Board designated for the purpose *if he files a written request therefor with-*

in ten days after the Local Board has mailed a notice of classification (SSS Form 110) to him. Such ten day period may not be extended." (Emphasis supplied.)

Section 1626.2 reads in part as follows:

"*1626.2 Appeal by Registrant and Others.*

(a) The registrant, * * * may appeal to an appeal board from any classification of a registrant by the local board except that no person may appeal from the determination of the registrant's physical or mental condition.

* * * * * * * *

(c) The registrant * * * may take an appeal authorized under paragraph (a) of this Section at any time within the following periods:

(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110)."

"1622.30(d) In the consideration of a dependency claim, any payments of allowance which are payable by the United States to the dependent of persons serving in the armed forces of the United States, shall be taken into consideration * * *"

"*1632.2 Postponement of Induction; General.*

(a) * * * the Director of Selective Service or any State Director * * * may, for good cause, at any time after the issuance of an Order to Report for Induction (SSS Form No. 252) postpone the induction of a registrant until such time as he may deem advisable * * *"

Statement of the Case.

There is one question in this case which was presented to the District Court in the oral argument [Tr. 74] of the first of the two habeas corpus cases consolidated on this appeal, and it is still the principal question to be decided in this appeal.

That question is whether or not appellant, who was originally classified 4-F, which classification he accepted without appeal, can, long after, when he is reclassified 1-A and ordered to report for induction, go back and object to that original 4-F classification.

Because of the fact that appellant was in a deferred classification his liability for service was extended from age 26 to age 35, pursuant to the provisions of Section 6(h) of the Universal Military Training and Service Act, as amended in 1951.

The second question is whether or not, after being ordered to report for induction, the postponement of the date of induction constituted a reopening of the classification of petitioner. If, the postponement of the date of induction did *not* constitute a reopening, then appellant's claims for deferment because of dependency, and a pregnant wife, were presented too late.

There is the third question, present in all habeas corpus Selective Service cases, whether or not the Selective Service file shows a *basis in fact* for the classification given to appellant by the Board, and upon which the induction was based.

It is the Government's position that there was a basis in fact in the Selective Service file for the 4-F classification which was given to appellant, and that there was a basis in fact for the 1-A classification which was subsequently given to appellant.

There is one correction which should be noted in appellant's brief, under "Statement of the Case" (App. Br. p. 2) it is said that it was "stipulated * * * that the matter was to be heard as if a Writ had been issued [Tr. 29]." The Transcript of Record does not support this statement, and the judgment of the Court denied the Petition for the Writ, which never issued.

Summary of Argument.

I.

APPELLANT, HAVING FAILED TO APPEAL HIS CLASSIFICATION AS 4-F, WHICH EXTENDED HIS LIABILITY FOR SERVICE FROM AGE 26 TO AGE 35, CANNOT NOW GO BACK AND OBJECT TO THAT ORIGINAL 4-F CLASSIFICATION, AFTER HE HAS SUBSEQUENTLY BEEN CLASSIFIED 1-A AND INDUCTED INTO THE ARMED FORCES.

A. THERE WAS A BASIS IN FACT IN THE SELECTIVE SERVICE FILE FOR THE 4-F CLASSIFICATION GIVEN APPELLANT ON JANUARY 23, 1950, AND FOR THE SUBSEQUENT 1-A CLASSIFICATION GIVEN APPELLANT ON OCTOBER 7, 1952, AFTER APPELLANT WAS 26 YEARS OF AGE.

B. IT WAS NOT ERROR FOR THE COURT TO EXCLUDE EVIDENCE AS TO WHETHER THE BOARD CONSIDERED THE FILE, THERE BEING A BASIS-IN-FACT IN THE FILE FOR THE CLASSIFICATION GIVEN APPELLANT.

II.

NOTICE OF POSTPONEMENT OF THE DATE FOR INDUCTION OF APPELLANT DID NOT OPERATE TO REOPEN HIS CLASSIFICATION.

A. THE CLAIM OF PREGNANT WIFE WAS MADE AFTER THE ORDER TO REPORT FOR INDUCTION AND WAS THEREFORE TOO LATE, AND IS NOT SUCH A CHANGE IN THE REGISTRANT'S STATUS AS TO REQUIRE THE BOARD TO REOPEN HIS CLASSIFICATION.

B. THE LOCAL BOARD HAD NO RIGHT, PURSUANT TO SECTION 1622.30(c)(2), TO REOPEN THE CLASSIFICATION OF APPELLANT AFTER THE ORDER TO REPORT FOR INDUCTION; SECTION 1625.2, AND THE CASES CONSTRUING IT, ARE INAPPLICABLE WHERE A CLAIM FOR A III-A CLASSIFICATION IS FILED TOO LATE.

III.

APPELLANT DID NOT REQUEST A PERSONAL APPEARANCE BEFORE THE BOARD AND THERE WAS NO DENIAL OF DUE PROCESS.

ARGUMENT.

I.

Appellant, Having Failed to Appeal His Classification as 4-F, Which Extended His Liability for Service From Age 26 to 35 Years, Cannot Now Go Back and Object to That Original 4-F Classification, After He Was Subsequently Classified 1-A and Inducted Into the Armed Forces.

A. There Was a Basis in Fact in the Selective Service File for the 4-F Classification Given Appellant on January 23, 1950, and for the Subsequent 1-A Classification Given Appellant on October 7, 1952, After Appellant Was 26 Years of Age.

A photostatic copy of the Selective Service File of appellant was introduced in evidence as Exhibit 1 of respondent (appellee here). The pages of the file have been numbered in handwriting and the numbers circled, at the bottom of each page. The classification questionnaire submitted by appellant is contained at pages 2 to 10, and page 11, being the last page thereof, is the place where the entries of Minutes of Action by the Local Board and Appeal Board are made.

The facts, as shown by the Selective Service file, are that petitioner was born on October 2, 1925, and at the age of 23, on January 23, 1950, was classified 4-F, a deferred classification. Petitioner accepted said classification, made no appeal therefrom, and was therefore not called for service. On June 19, 1951, liability for service was extended for *deferred classifications* from age 26 to age 35 (Universal Military Training and Service Act

of 1951, 50 Appendix U. S. C. 456(h)), and appellant's liability for service was thereby extended to age 35.

Section 1641.2(b) provides:

> "1641.2 *Failure to Take Notice.*
>
> (b) If a registrant * * * fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

Over a year later, on October 7, 1952, the Local Board reviewed appellant's file and classified him 1-A, and on November 25, 1952, sent him an order to report for induction on December 10, 1952. In the meantime appellant had appealed the 1-A classification and it was upheld by the Appeal Board. On November 29, 1952, the Board postponed the induction of appellant, but did not reopen the file for classification, and the petitioner was, on August 21, 1953, duly and regularly inducted into the Armed Forces of the United States. These facts are contained in the findings of the District Court in the first habeas corpus action [Tr. 20, 21].

In addition, the court concluded as a matter of law that there was evidence before the Local Board to support its classification of petitioner as 4-F and to support the classification later on as 1-A; that the classification of 1-A was made in conformity with Selective Service Regulations and the Universal Military Training and Service Act; that there was due process and the action was not arbitrary nor capricious [Tr. 22].

A chronology of the action taken is as follows:

Date	Action Taken [Ex. 1, p. 11]
October 2, 1925	Appellant born.
January 23, 1950	Appellant classified 4-F.
January 31, 1950	SSS Form 110 mailed to appellant, notifies him of 4-F classification and advises him he may appeal from that classification by filing a written notice within 10 days, or request a personal appearance. Appellant does not appeal.
June 19, 1951	Universal Military Training and Service Act in Section 6(h) extends liability for service to age 35 from age 26. Appellant is still 25 years of age.
October 2, 1951	Appellant is 26 years of age, but still liable for service because still classified 4-F, a deferred classification.
April 7, 1952	Form 223 mailed, orders appellant to report for physical examination.
September 30, 1952	Form 62 the "Determination" of physical condition [Ex. 1, p. 23], mailed to appellant, is notice of acceptability by the Armed Forces.
October 7, 1952	Appellant classified 1-A by vote of 2 members of Local Board, and mailed SSS Form 110 [Ex. 1, p. 11].
October 16, 1952	Letter of appeal received from appellant [Ex. 1, pp. 25-28].
October 22, 1952	Reviewed by Local Board, no change.
October 22, 1952	Form C-140 mailed to appellant, is notice to him of Local Board's review and its decision that the infor-

Date	Action Taken
	mation submitted does not warrant reopening of registrant's classification. Appellant's file forwarded to Appeal Board on same date.
November 24, 1952	Appellant's file returned from Appeal Board, classified 1-A.
November 25, 1952	SSS Form 110 mailed to appellant and Form 252 mailed, ordering appellant to report for induction on December 10, 1952 [Ex. 1, p. 30].
November 29, 1952	Form 264 issued [Ex. 1, p. 43], induction postponed pending investigation of dependency. Notice reads, "It is your continuous duty to report for induction upon the termination of this postponement and to report at such time and place as is fixed hereinabove or may hereafter be fixed by this local Board."
December 19, 1952	Local Board requests investigation [Ex. 1, p. 41] in N. Y.
May 11, 1953	Report of Investigation by N. Y. [Ex. 1, pp. 56-60].
June 24, 1953	Letter and file forwarded to State Headquarters.
July 2, 1953	File returned with letter from State Headquarters.
August 5, 1953	Form C-190 issued, directing appellant to report for induction on August 21, 1953.
August 21, 1953	Appellant duly and regularly inducted into the Armed Forces of the United States.

The argument is made in Points I, C and D of appellant's brief, and in Point II of appellant's brief (App. Br. pp. 18-28), that "no appeal was permitted" from the 4-F classification and that the classification was invalid.

Appellant has failed to distinguish the phrases "classification" and "determination" as used in Section 1626.2 (a) of the Regulations (see Statutes Involved), which reads: "The Registrant * * * may appeal to an Appeal Board from any *classification,*" and "no such person may appeal from the *determination* of the registrant's physical or mental condition" (emphasis supplied). It is clear from said section that appellant could have appealed from the classification of 4-F on January 23, 1950, but that after a physical examination by the Army and a "determination," by the Army of appellant's physical condition, there was no appeal.

It will be noted in the above chronology that there was no physical examination of appellant at the time of his classification of 4-F, and therefore no "*determination* of the registrant's physical or mental condition." The Form SSS 110 which was mailed to the petitioner after his classification of 4-F, on January 31, 1950, contains the provisions "you may appeal from this classification by filing written notice within 10 days," and said form further advises appellant of his rights to a personal appearance and other rights. In other words, "4-F" is an appealable "classification" not a non-appealable "determination of physical condition."

On April 7, 1952, Form 223 ordered appellant to report for a physical examination, and thereafter, on September 30, 1952, Form 62 mailed to him advised that he was acceptable. That Form 62 [Ex. 1, p. 23] is the "deter-

mination of the registrant's physical condition," from which there is no appeal.

The fact is, appellant received a 4-F classification which he was happy to accept, being thereby deferred from service in the Armed Forces. There was every possibility that he would reach the age of 26, on October 2, 1951, without being drafted, and his eligibility for service would expire. By not appealing the 4-F classification, appellant took the chance that the liability for service might be extended beyond the 26 years, and he lost, because liability for service was extended to age 35 before he reached the age 26. But it was a chance he took, and having elected not to appeal the 4-F classification, after notice it was appealable, he cannot now complain. See *Olinger v. Partridge,* 106 F. 2d 986, where this Court said at page 987: "Olinger's inaction . . . amounts to a waiver of any rights which he may have claimed . . ."

The case of *United States v. Shaw,* 118 F. S. 849, cited by appellant (App. Br. p. 23), is not analogous. In the *Shaw* case, the registrant was born December 5, 1924, and on January 8, 1951 (after registrant was 26 years of age and prior to the June 19, 1951 amendment to the Act extending liability for service from 26 to 35 for deferred classification) he was ordered to report for Induction. He was *not* in a deferred classification at that time, and was making no claim for a deferred classification. The Court properly set aside Shaw's plea of guilty to an indictment for refusing induction.

See also this Court's decision in *Sisquoc Ranch Co. v. Roth,* 153 F. 2d 439 (1946), where a II-A deferred classification was later, with nothing new, changed to a I-A, and the reclassification was sustained and the denial

of the Petition by the District Court was affirmed on appeal.

See also *Tyrrell v. United States,* 200 F. 2d 8, where a IV-D was reclassified I-A, and the Court, in affirming a judgment of conviction, said at pages 11 and 12:

> "The duty of local draft boards to classify and reclassify registrants * * * is one of continual recurrence * * *
>
> * * * * * * * *
>
> It is to be presumed that the board discharged this duty * * * and consequently the court properly charged the jury that there existed a basis in fact for the classification of August 28, 1950."

Furthermore, the 4-F classification was valid because there was a "basis in fact" in the file for such classification, which is all that is required to sustain a classification of the Board by the *Cox* and *Dickinson* cases. *Cox v. United States,* 332 U. S. 442 at page 453; and *Dickinson v. United States,* 346 U. S. 389, 74 S. Ct. 153.

The basis in fact in the file for the 4F classification is contained in the Selective Service classification questionnaire [Ex. 1, p. 10] where, under the heading "Physical Condition," is the question (1) "Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces?" and a place for answer Yes or No. Appellant marked the answer "No."

In answer to Question (2), "If the answer to Question (1) is 'yes,' state the condition from which you are suffering," appellant stated as follows:

> "I was discharged from Naval Reserve Training Corp. because of a punctured eardrum—later examination show no such condition."

Later, on the same page of the classification questionnaire, under the heading "Registrant's Statement Regarding Classification" where it says "The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the local Board in determining this classification," appellant had written:

> "As stated in Series 15, I feel that the condition of my eardrum should be clearly established."

Under State Director's Advice No. 55, issued by General Hershey, local boards were authorized to place in classification 4-F any registrant who had theretofore been rejected for service by the Armed Forces. It was not incumbent on the Board at that time to require a physical examination of appellant, and upon the showing made in the classification questionnaire there was a basis in fact for the 4-F classification, and it was therefore valid. Page 11 of Exhibit 1 indicates the minutes of action by the Local Board and shows as follows: On January 23, 1950, the vote of the Board members was two in favor of the 4-F classification.

In this state of the record, and in the absence of any appeal or request for personal appearance or other action by the appellant, after receiving notice in the Form 110 of his rights to make such request, there can be no question but the 4-F classification was valid.

B. It Was Not Error for the Court to Exclude Evidence as to Whether the Board Considered the File There Being a Basis-in-Fact in the File for the Classification Given Appellant.

Furthermore, evidence as to whether or not the individual members of the draft board actually considered the file, as offered by appellant at the hearing on the second writ of habeas corpus, is immaterial. The District Court did not err in excluding such evidence because, since the file actually supports the classification of 4-F, such evidence would be immaterial. Appellant would not have sustained his offer of proof, as appellee was in possession of evidence to the contrary but objection was made, because if every classification could be attacked by an attempted showing that at a time several years past, when some classification was made, the Board members did not actually consider the file, there would never be an end to litigation in Selective Service cases. Clearly, if it is error at all, it is not prejudical error to exclude such evidence, where the file itself contains a basis-in-fact for the classification, and appellant should not be allowed to go so far afield. The presumption of regularity of the acts of the Draft Board officials is in this instance buttressed by the Selective Service file itself, which indicates [Ex. 1, p. 10, *supra*] that two Board members actually voted for the 4-F classification.

Appellant claims (App. Br. p. 14) that the Local Board was "early won over to the registrant's viewpoint" and so expressed itself in the June 24, 1953, letter to the State

Director [Ex. 1, pp. 63-64]. A careful reading of that letter reveals only that the Local Board recognized the legal point involved in the question of extension of liability for service, and wished the Appeal Board to pass on it. The Local Board said in that letter:

> "after careful review of the evidence, this Local Board feels that this might well be the case, and would hesitate to enforce an order for induction, in error. Therefore we are requesting a review of his questionnaire and the letter of October 14, 1952, submitted by the registrant in support of his appeal * * *"

The *Cox* and *Dickinson* cases, *supra,* clearly settled that it is not a question of what is in the minds of the Board members, but rather it is a question "What is in the file?" "Is there a basis in fact in the file for the classification?" The court clearly did not err in excluding evidence regarding the sympathies of the Board members.

Further, there was basis in fact in the file for the subsequent 1-A classification given appellant on October 2, 1952. It is clear from the Regulations that it is the continuing duty of the boards to "keep informed of the status of classification registrants," and that no classification is permanent (Sec. 1625.1(a) and (c), *supra*). It is not disputed that the Board may at any time review a classification given.

On or about April 7, 1952, the Board mailed appellant Form 223, an order to report for physical examination. He did so report. Page 23 of Exhibit 1 is the "Certificate of Acceptability," dated September 12, 1952, after the Army had made a physical examination of appellant, and that is the "determination" of physical condition men-

tioned in Section 1626.2 of the Regulations. The Army had checked the findings "found fully acceptable for induction into the Armed Services." Page 23, then, is the new evidence in appellant's file which is the "basis of fact" for the change in classification to 1-A by the Local Board on October 7, 1952, subsequently affirmed after an appeal to the Appeal Board.

We cannot agree with appellant's analysis that the Board is required by the *Dickinson* case, *supra,* to "build a record" in this case (App. Br. pp. 27-28). Taken out of context and applied to other types of cases, the language of the *Dickinson* case is misleading.

Dickinson claimed exemption as a conscientious objector, and there was no evidence in the file to controvert this claim. The court said, at page 397:

> "But when the uncontroverted evidence supporting a registrant's claim placed him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The distinction in the present case is evident. The evidence in the file does *not* place appellant *prima facie* in a III-A classification, and a review of the facts in the file sustain the view that it was *not* an abuse of discretion to classify appellant 1-A. In other words, it cannot be said that the facts in appellant's file *prima facie* entitle him to a III-A classification. Reasonable men might disagree, but it was not an abuse of discretion to classify appellant IV-F, or subsequently to classify him 1-A because there was at the time of each classification a "basis-in-fact" to support such classification. Classifications

such as III-A and IV-F are deferred classifications pursuant to regulation in the discretion of the Board, whereas the IV-D classification in the *Dickinson* case is an exemption by statute, merely requiring a factual determination by the Board of whether the registrant is or is not a minister, and does not involve the exercise of discretion. Appellant cites the case of *United States v. Sage,* 118 Fed. Supp. 33, in support of his argument (App. Br. p. 17) that he should be allowed to offer evidence as to whether or not the Board considered the file, without regard to whether or not the file shows a basis-in-fact for the classification. The quotation in appellant's brief from the *Sage* case does not correctly represent the court's decision as we read that case. There is no holding by the court that a defect in procedure had to be cured, resulting from the fact that an unauthorized person had seconded a motion made in connection with defendant's classification by the Board. No such question was raised in the case. The statement is made in connection with a recital of the action taken by the Appeal Board, which at one stage of the proceedings had returned to the Local Board the file "because it was incomplete and because an unauthorized person had seconded a motion made in connection with the defendant's classification by the local." The Local Board had reopened the case and cured the defect, and the *Sage* case does not hold that it is reversible error because that question was not before it. The case is really analogous to the *Dickinson* case, in holding that there was no basis-in-fact for the

classification of the defendant as 1-A, and no evidence upon which the court could deny the exemption as a minister.

Appellant cites the case of *United States ex rel. Accardi v. Shaughnessy,* 347 U. S. 260, in support of statements that the "classification must be done by the Board" and that the "evidence in the file must be considered before classification." The *Accardi* case is one where it was alleged in a habeas corpus petition that the denial of the petitioner's application for suspension of deportation by the Board of Immigration Appeals, was "prejudged by the issuance by the Attorney General in 1952, prior to the Board's decision, of a confidential list of 'unsavory characters' including this petitioner's name, which made it impossible for him to secure fair consideration of his case." The court said, at page 268:

> "After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right."

What the court is objecting to in the *Accardi* case is that the Board went *outside* the record and considered something not in the record in arriving at a discretionary decision not in favor of appellant. The factual situation is too far removed from the present case, for the *Accardi* case to be helpful.

II.

Notice of Postponement of the Order for Induction of Appellant Did Not Operate to Reopen His Classification.

A. The Claim of Pregnant Wife Was Made After the Order to Report for Induction and It Was Therefore Too Late, and Is Not Such a Change in the Status as to Require the Board to Reopen Registrant's Classification.

Point IV of appellant's brief claims a denial of due process for failure to reopen appellant's classification, after sending him the Order to Report for Induction. There is language in appellant's argument about how the Board "and doubtless the Clerk too," came to have a "sympathetic attitude towards appellant," but that their construction was "too literal" and "harshly bureaucratic construction," and language that where the registrant had presented in his file evidence for various "deferred classifications" that "all of it was ignored." This language is unsupported by fact.

As the file will show [Ex. 1] appellant enjoyed deferment by reason of a IV-F classification from January 23, 1950 to April 7, 1952, when he was ordered to report for a physical examination, and knew from that latter date forward, that he faced the possibility of being classified 1-A and ordered to report for induction. The facts show that after appealing the 1-A classification, which was affirmed, that on November 25, 1952, an Order to Report for Induction was mailed to appellant in New York and after receipt of same, and on December 1, 1952, he forwarded to the Board the statement of the doctor and his letter indicating that his wife was in the second month of pregnancy, which would place conception sometime in early October 1952.

As a result of what appellant terms a "harshly bureaucratic construction," the Board requested a postponement of the induction, and the Coordinator for the Boards granted the postponement for thirty days, and a further investigation ensued. As a matter of actual fact the notice terminating postponement of induction and requiring appellant to report to the Board for induction was not sent until the following year, August 5, 1953, and appellant was not inducted until August 21, 1953. The "bureaucratic" Board (despite the fact that the regulations, Sec. 1622.30(c)(2), provided that no registrant shall be placed in Class III-A because he has a child which is not yet born unless, prior to the time the Local Board mails him an order to report for induction, there is filed with the Local Board the certificate of a licensed physician stating that the child has been conceived), somehow postponed the induction until after the child was born. During the ensuing year the evidence was reviewed and further investigation made.

Clearly under Section 1625.2 of the Regulations the classification could not be reopened until or unless the Local Board first found there had been a change in the registrant's status resulting from "circumstances over which the registrant had no control." The Director of Selective Service, Hershey, had long since advised the local boards (Operations Bulletin No. 57) that pregnancy is a status over which the registrant does have control, and it is therefore not a claim which can be classified under "hardship" such as sickness, death or an extreme emergency beyond the registrant's control.

This would seem to be a case where, to paraphrase a phrase, the Board is "blamed if it does, and blamed if it does not." Appellant would seem to have had every possible chance to avoid induction, by reason of his IV-F

classification, and the subsequent over one-year postponement of induction. That the exigencies of war required that those classified 1-A be inducted into the Armed Services, was a chance which appellant like all other eligible inductees had to take, and over which the Board had no control.

The chronology of the above incident is as follows:

DATE	ACTION TAKEN
Nov. 25, 1952—	Form 252 mailed to appellant, being Order to Report for Induction on December 10, 1952 [Ex. I, p. 30].
Dec. 5, 1952—	[Ex. 1, pp. 31, 32, 33] Letter from appellant in New York mailed after receipt of order to report for induction together with statement of Dr. Kingsley that appellant's wife was in the second month of pregnancy and had been under his care since June 13, 1952 "for difficulties in conception, hormone treatment and observation of the ovulation, finally led to conception."
Dec. 5, 1952—	Board letter to District Coordinator [Ex. 1, p. 35] recommending postponement of induction.
Dec. 16, 1952—	Letter from Board Coordinator granting postponement of induction [Ex. 1, p. 39].
Dec. 29, 1952—	SSS Form 264 issued postponing induction for 30 days contains the follow-lowing: "It is your continuous duty to report for induction upon termination of this postponement and to report at such time and place as is fixed hereinabove or may hereafter be fixed by this local board."
Aug. 5, 1953—	Form C-190, letter directing registrant to report for induction on August 21, 1953.

The Board letter of December 5, and the Coordinator's letter of December 16, *supra,* are here set forth in full.

"December 5, 1952

Major E. M. Keeley
Coordinator, District No. 5
1206 South Santee Street
Los Angeles, California

Subject: Warren E. Talcott
4-95-25-647

Dear Sir:

On November 26, 1952 our subject named registrant was mailed an order to report for induction on December 10, 1952.

We are now in receipt of information verified by physicians' reports of the extreme illness and dependency of his wife. After careful consideration of this Local Board it is their opinion that this dependency should be investigated further.

Therefore, this Local Board recommends that this induction be postponed for a period of thirty days to allow further investigation of this claim, if the facts as presented warrant, permission to reopen and reclassify.

Yours truly,
Mabel S. Wallace
Group Coordinator."

"Selective Service System
Headquarters, District No. 5
1206 So. Santee Street
Los Angeles 15, California

16 December 1952

Local Board No. 95
Los Angeles County

Dec. 18 1952 (date received stamp)
10821-23 Santa Monica Blvd.

Los Angeles 25, Calif.

Local Board No. 95
10823 Santa Monica Blvd.
Los Angeles 25, California

Subject: Warren E. Talcott
SS No. 4-95-25-647

Gentlemen:

Your local board has requested of me a postponement of the registrant's induction of 10 December 1952. The registrant has requested a transfer for induction, and a physician's letter now verifies that the wife is pregnant and is very ill. You have requested this postponement for the purpose of further investigating the dependency.

It is noted that this registrant remained in a IV-F classification because of an alleged punctured ear drum. Being in a IV-F classification, the registrant's liability was extended. The registrant was ordered to report for physical examination and the punctured ear drum was apparently found to be in error. The file discloses that shortly after the registrant was ordered to report for physical examination, his wife started hormone injection treatments in order to bring on conception. Conception was not successful at the time the registrant was classified I-A, and had

not materialized at the time the registrant took an appeal. According to the doctor's letter, laboratory tests did not show conception until after the registrant had been ordered for induction. The doctor's letter is rather vague as to the wife's illness. The letter sets forth that the registrant's wife is suffering from morning sickness which, I am informed by one of our doctors, is to be expected. It is also noted that the local board of transfer in New York did not return the physical papers for nearly six months. The file discloses that the parents of the wife reside in San Marino, California and no contention is made that they are in financial distress.

Your attention is called to Section 1622-30(c)(2) of Selective Service Regulations and to Operations Bulletin No. 57.

Under the authority vested in me by the State Director of Selective Service for the State of California, the registrant's induction is hereby postponed under the provisions of Section 1632.2 of Selective Service Regulations for a period of thirty days.

FOR THE STATE DIRECTOR
/s/ ELIAS M. KEELEY
Elias M. Keeley
Major, AGC
Coordinator—District 5."

We do not understand the argument by appellant at page 23 of his brief that "the postponement was 'for a reason not related to the filing of the certificate.'" Obviously, the postponement indicated in the letter [Ex. 1, p. 39], was made pursuant to Section 1632.2(a) of the Regulations which provide as follows:

"Section 1632.2 Postponement of Induction; General. (a) * * * The Director of Selective Service

> or any State Director of Selective Service (as to registrants registered within his State) may, for good cause, *at any time* after the issuance of an order to report for induction (SSS Form 252), postpone the induction of a registrant until such time as he may deem advisable, and no registrant whose induction has been thus postponed shall be inducted into the Armed Forces during the period of any such postponement."

Subsection (d) of Section 1632.2 of the Regulations further povides:

> "(d) A postponement of induction shall *not* render invalid the order to report for induction (SSS Form No. 252) which has been issued to the registrant but shall operate only to postpone the reporting date and the registrant shall report on the new date without having issued to him a new order to report for induction (SSS Form No. 252)."

B. The Local Board Had No Right, Pursuant to Section 1622.30(c)(2), to Reopen the Classification of Appellant After the Order to Report for Induction; Section 1625.2, and the Cases Construing It, Are Inapplicable Where a Claim for a III-A Classification Is Filed Too Late.

We have already pointed out that Section 1625.2 of the Regulations is inapplicable because it only provides for a reopening of a classification where the Board first "specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control," and a claim for III-A classification because of pregnant wife has been held to be a circumstance over which the registrant has control. See *Ex parte Hannig,* 106 Fed. Supp. 715, where the Court said the Board was "powerless to reclassify" unless a change of

status "over which he had no control." Therefore, the cases cited in appellant's brief, pages 36 to 41, construing this section, and involving criminal prosecutions and claims of exemption as conscientious objectors, are inapplicable.

As pointed out, *supra,* Section 1622.30(c)(2) (*supra*), is the special Regulation applicable to the claim of III-A because of pregnant wife and there are no cases cited which hold that it is an abuse of discretion for the Board not to reopen a classification claimed under that section. Nor are there any cases which hold that that portion of the regulation is contrary to the Congressional intent as expressed in the Act.

The case of *United States v. Stalter,* 151 F. 2d 633, cited by appellant, was a case which raised the question whether relator's classification should be determined according to his status at the time of his registration, or at the time of his final classification. There is no question involved in the case about reopening a classification after receipt of an order to report for induction. All the court is holding is that the time of his "final classification" is the time as of which the status should be determined. The portion of the opinion quoted at page 36 of appellant's brief was discussing this situation when the court said, "We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to a deferment." Appellant failed to finish the quotation of that particlar paragraph where the court went on to say ". . . and we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than that at the time of registration."

The case of *United States v. Crawford* (N. D. Cal. Feb. 5, 1954), 119 Fed. Supp. 729, involves a claim of conscientious objection, and also involves Section 1625.2 of the Regulations and, again, is inapplicable to the present situation for the reasons above stated.

The case of *Berman v. Craig,* 207 F. 2d 888, is another case involving Section 1625.2 of the Regulations, and a claim for classification of III-D by reason of registrants' change of status to that of a divinity student.

The case of *United States v. Clark,* 105 Fed. Supp. 613, which involves "exemption" by statute and not a discretionary "deferment," is also inapplicable to the present situation, because they are construing the right to an appeal from the denial of a claim of conscientious objection where the claim for classification as a conscientious objector was made after the order to report for induction. In construing Section 6(j) of the Selective Service Act, the court said, at page 614:

> "The section prescribes a procedure to be followed by the Appeal Board, provides for an inquiry and recommendation after the hearing by the Department of Justice, and gives a right of appeal to 'any person claiming exemption' as a conscientious objector 'if such claim is not sustained by the local board.' This section does not indicate any restriction or limitations on the right of appeal, and we think that under the facts of this case, the defendant was entitled to an appeal from the decision of the local Board refusing to grant his claim for exemption as a conscientious objector."

The *Clark* case is further distinguished by the fact that in the instant case the classification of appellant as 1-A had been appealed and the Appeal Board had sustained the classification. In general, the reasoning and statements of the court in the opinions on "exemptions" in conscientious objector cases in criminal prosecutions are not applicable to claims for "deferment" on other bases in actions in habeas corpus.

III.

Appellant Did Not Request a Personal Appearance Before the Board and There Was No Denial of Due Process.

The facts do not support appellant's claim in Point III of his brief that after receipt of notification of his classification as 1-A on October 7, 1952, appellant requested an opportunity to appear in person before the members of the Local Board, which right he has under Section 1624.1 of the Regulations providing he files a written request therefor within ten days after the Local Board has mailed a notice of classification (SSS Form 110) to him.

Appellant's letter dated October 14, 1952, was properly treated as a notice of appeal, but we think there was no error by the Board in not considering that letter a request for a personal appearance, when it specifically stated, "I would have preferred to appear before you to relate these circumstances more fully. However, the distance and expense presents difficulties. However, after reviewing this appeal, if you feel my appearance would offer

a more complete hearing, I will be glad to appear in person."

This letter [Ex. 1, p. 25] clearly was not a request for a personal appearance before the Board. A personal appearance would necessarily have to be before the Board in California and appellant was in New York.

Thereafter, on October 22, 1952, a Form C-140 was mailed to appellant, notifying him that the information submitted did not warrant the reopening of his classification, and thereafter petitioner's file was forwarded to the Appeal Board for the review requested. The Appeal Board sustained the classification of 1-A, and on November 25, 1952, mailed a Form 110, notice thereof, to appellant. Thereafter, the request for postponement of the induction was made by appellant, and the claim of dependency was raised, and on December 29, 1952, Form 264 was issued postponing the induction. At about that time the Local Board requested an investigation be made in New York [Ex. 1, p. 41] regarding appellant's claim of dependency and hardship.

Thereafter, on May 11, 1953, the report of the investigation made in New York by the Veteran Assistance Welfare Center was received by the Local Board [Ex. 1, pp. 56-60]. That report of investigation indicates that the appellant was interviewed regarding his claim. In other words, although appellant did *not* request a personal appearance, because he did not desire to come to California and appear before the Board, nevertheless, he received

the same result as though he had had a personal appearance, by reason of the investigation by the New York agency. There was no denial of due process.

It is respectfully submitted that the findings and judgment of the District Court should be affirmed.

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Nos. 14208-14218

United States Court of Appeals

For the Ninth Circuit

WARREN E. TALCOTT, JR.,
Appellant,

vs.

COMMANDING OFFICER, et al,
Appellees.

Appellant's Opening Brief

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United States Court of Appeals

For the Ninth Circuit

WARREN E. TALCOTT, JR., *Appellant,*	No. 14208
vs.	
COMMANDING OFFICER, et al, *Appellees.*	No. 14218

Appellant's Opening Brief

JURISDICTION

These consolidated appeals are from judgments of the District Court of the United States in and for the Southern District of California, Central Division. Appeal No. 14208 is from an order made on September 24, 1953 by the Honorable Dave W. Ling, United States District Judge [R. 23] denying a writ of habeas corpus. Appeal No. 14218 is from an order made on October 29, 1953 by the Honorable Harry C. Westover, United States District Judge [R. 109] denying a writ of habeas corpus.

The District Court had jurisdiction by virtue of Title 28, U.S.C., §451, to receive the petitions filed by the petitioner, seeking his release from the respondents Secretary of the Army and Commanding Officer.

This Court has jurisdiction to review, on appeal, the final orders of the District Court by virtue of Title 28, U.S.C., §463.

STATEMENT OF CASE

Appellant filed a petition for a writ of habeas corpus August 21, 1953 [R. 3]. An order to show cause was issued [R. 14]. At the time of hearing, September 1, 1953, it was stipulated that the petition was to be considered as a traverse of the return and that the matter was to be heard as if a writ had been issued [R. 29]. The petition alleged in substance that the Selective Service System order to report for and submit to induction was illegal because:

> It was based on a classification of petitioner that was made when registrant was over 26 years of age. Additionally, because
>
> It was based on a selective service processing that had denied him a personal appearance before the local board, that had included an improper failure to reopen his classification; that the classification was made at an illegal meeting and that the order to report for induction was not executed as required.

The undisputed evidence showed the following: that petitioner throughout the four years of his selective service history, was classified only twice by his local board: IV-F and I-A; that petitioner was orig-

inally classified January 27, 1950, in Class IV-F (physically unfit) and that this classification resulted in an administrative extension of his liability beyond age 26 so that his subsequent classification on October 7, 1952 in Class 1-A (liable for immediate duty), although made after his 26th birthday, was under color of law.

The evidence showed that when petitioner filed his Classification Questionnaire on April 27, 1949 he answered the questions in Series XV—Physical Condition, as follows [Ex. p. 10]*

> "1. Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces?
> Yes [ ] No [X]
> "2. If the answer to Question 1 is "yes", state the condition from which you are suffering. I was discharged from Naval Reserve Training Corp. because of a punctured eardrum—Later examination show no such condition."

He was asked to state what he believed his classification should be and he made *no* statement in the blank space provided. He was then informed:

> "The registrant may write in the space below or attached to this page any statement which he believes should be brought to the attention of the local board in determining his classification. As

*The selective service file (in photocopy form) is before the court as the Exhibit. It was pagenated, for trial use, at the bottom of each sheet by a one-quarter inch high number in a circle.

stated in Series XV, I feel that the condition of my eardrum should be clearly established." [Ex. p. 10].

The evidence [a letter sent by the chairman of the local board to the State Director of Selective Service] further showed:

"On January 23, 1950 he was classified IV-F without a physical examination. Upon review of the files in 1952 his liability was extended to age 35. During the ensuing IV-F review he was ordered for a physical examination and found acceptable, after having passed his 26th birth date." [Ex. p. 63].

The letter closed:

"His mother called this office requesting the address of State Headquarters, stating that his attorney had advised him that his liability has been extended in error, due to the fact that at no time prior to his 26th birth date, did he claim deferment, and also his request that his physical condition be verified was not fulfilled until after his 26th birth date.

"After careful review of this evidence, this Local Board feels that this might well be the case, and would hesitate to enforce an order for induction, in error.

"Therefore, we are requesting a review of his questionnaire and the letter of October 14, 1952 submitted by the registrant in support of his appeal. If your determination is that this liability

was extended in error, we request permission to re-open and reclassify into Class V-A, as it is our considered opinion that this evidence was not properly evaluated at the time of his original classification nor upon the extension of his liability." [Ex. p. 64].

The evidence also showed that petitioner had written his local [Santa Monica] board on October 14, 1952 from New York City. This was within 10 days from the Notice of Classification of I-A. The Notice of Classification (SSS Form No. 110) informs the registrant he may appeal and may have an Appearance Before Local Board. His letter of October 14, 1952 responded to this information and conformed to the Regulations §1626.2(c)(1) for appeal and §1624.1(a) for personal appearance before local board. [32 C.F.R.]. His letter indicated that petitioner desired the two avenues for relief: "I wish this to serve as my notice of appeal from my classification into I-A. Since my appeal is based on circumstances extending over the last 5 years, I would have preferred to appear before you to relate the circumstance more fully. However, the distance and expense present difficulties. However, after reviewing this appeal, I will be glad to appear in person." (underscoring supplied). [Ex. p. 25].

The evidence showed that the local board, although it reviewed the file on October 22, 1952, immediately thereafter sent the file to the Appeal Board *without giving petitioner the requested opportunity for a per-*

sonal appearance. Petitioner has never had an Appearance Before Local Board [Ex. p. 10, Minute Entries].

The evidence also showed that petitioner was classified 1-A on October 7, 1952 [Ex. p. 10] which was after he had reached his 26th birthday [Ex. p. 9].

The evidence also showed that the petitioner supplied the local board with the standard evidence that he was a father [Ex. pp. 31, 32, 33].

When Judge Ling denied petitioner a writ, a "successive" petition was filed wherein all but one of the former grounds were set forth (one being abandoned) and a new ground was additionally presented [R. 87]. This new ground came to petitioner's knowledge, as follows:

When Judge Ling's decision became known the two board members made themselves available to the petitioner and disclosed to him that they were prepared to testify:

> "That when the board classified him in Class IV-F which extended his liability, that was the effect of when they did that, they did it without looking in the file, without considering the evidence. It was a rubber stamp affair." [R. 125].

A formal offer of proof was made before Judge Westover, as follows:

> "If the chairman of the local board, a man who has been on the local board since 1940, Roger S.

Marshall, and if the other then active member of the local board, attorney Marshall Hickson, were called to the stand, they would testify as follows: That they never gave individual attention to petitioner's file in 1949 and 1950; that neither of them ever saw his file when the January 23, 1950, 4-F classification was made; that the facts concerning his physical condition and history as is shown on page 10 of the exhibit in this case, were never seen or considered by them or any of them until after he became 26 years old.

"That the classification of January 23, 1950, was considered by these two board members, the only active members at the time, a clerical procedure.

"That they know this is so because 'when the board came into it, we initialed it. This one of January 23, 1950 we didn't initial because we didn't see the file.' " [R. 143].

The court ruled that the evidence was immaterial, that all other issues presented in the Petition had been decided against petitioner by Judge Ling and the court denied a writ [R. 109].

QUESTIONS PRESENTED AND HOW RAISED

I.

During the hearing on the second Petition the appellant attempted to show that the local board never gave any consideration whatsoever to the facts in his file when the IV-F classification was entered in its records; that the board members never even saw the file at that time; that the classification entry of IV-F was made by the clerk and was her idea; that the board members were so prepared to testify; they were willing to come forward to so testify because they were distressed over appellant's plight and the failure of the court to grant him a writ on his first petition.

Appellant's position during the hearing on his second petition was that this point was a new one, not known to him until after the decision on the first petition.

The court believed he should have known of it. Appellant, by his counsel, stated he did not, could not, and that even if it had been available and/or raised in the first hearing (which it was not) he could again ask for consideration of it. The court decided the evidence was immaterial.

Therefore, the question presented here is whether a classification that results in an extension of liability can be attacked on the basis that it was itself illegally made.

II.

The undisputed evidence at the hearing on both petitions is that the evidence in the file on the subject of the IV-F classification is found on page 10 of the exhibit. Here, the registrant states he has no physical defect; that the navy once considered he had a punctured eardrum but that subsequent examination showed this to be untrue; he made no claim for a IV-F classification; he asked that the facts be looked into.

This point was argued at the first hearing; it was presented to the court, by the pleadings, in the second hearing. The court, during the second hearing, announced that all points in the pleadings had been considered.

The question presented is whether this evidence supports a determination that a basis-in-fact existed for a IV-F classification.

III.

The file shows that within the 10 day period after appellant received the I-A Notice of Classification he wrote that he desired an appeal and an Appearance Before Local Board if the board did not give him relief after it reviewed his file.

The board reviewed his file but neither gave him relief nor did it invite him to appear before it as he requested; it sent the file on to the appeal board.

The question here presented is whether he was entitled to an appearance before his local board and was he deprived of due process when he didn't get it.

IV.

The file shows that he sent the "standard" evidence of his wife's pregnancy to the board. It arrived a few days after the board had mailed him the Order to Report for Induction. In his letter of transmittal he explained he had not sent the pregnancy evidence as soon as he learned of his wife's condition because he had believed a 21 day period was required from final classification to an induction order.

The question presented is whether appellant's tardiness is excusable and, if not, is the regulation making an Order to Report a deadline, as applied to him, consistent with the intent of Congress.

SPECIFICATION OF ERRORS

Appellant's Statement of Points is on pages 116-117 and 145-146 of the Record, and is as follows:

In case number 14208

I.

The Court erred in denying petitioner a writ of habeas corpus.

II.

The Court erred in not making Findings of Fact and Conclusions of Law.

III.

The Court erred in deciding that petitioner had raised [53] no question of fact and of law undecided by Judge Ling in case number 15813.

IV.

The Court erred in rejecting, as immaterial evidence proffered by petitioner that he had discovered, after the decision of Judge Ling certain facts concerning his selective service processing and that all the local board members were prepared and ready to testify concerning them, namely: that they had never considered the evidence in his file when he was classified, that they had never even seen his file until after he was classified and that his classification was solely a "clerical" procedure.

In case number 14218

I.

The Court erred in denying petitioner a writ of habeas corpus.

II.

The Court erred in concluding that there were bases in fact for the classifications of IV-F and I-A.

III.

The Court erred in not concluding that appellant was arbitrarily and illegally deprived of a "father's" and other deferred classifications and also illegally deprived of administrative appeals for said classifications.

IV.

The Court erred in not concluding that there had been a "reopening" of the classification and that appellant had been illegally frustrated from securing a personal appearance hearing before the local board with the consequent right to an administrative appeal.

V.

The Court erred in not concluding that the classification action was invalid in that the record of the purported action is fatally insufficient to support a conclusion that there had been compliance with the legal requirements.

SUMMARY OF ARGUMENT

A writ must issue to an inductee when his induction was based on an invalid order to report for and submit to induction.

An order to report is invalid when:

1. It is based on a 1-A classification made after the registrant passes his 26th birthday and his liability for military service has not been properly extended; an unsought deferred classification of IV-F cannot extend liability especially when it was made solely by a clerk and more especially when there is no provision for appellate relief from such action. Put in other words the IV-F classification was made without any consideration whatsoever of the evidence by the constituted classifying authority and cannot be a basis for I-A classification made after the jurisdictional age of the registrant is passed.
2. The IV-F classification was arbitrary and contrary to the evidence then, or thereafter, before the board. For this additional reason it cannot be a basis for a I-A classification made after the registrant passes his 26th birthdate. In short

the rule used by the Supreme Court in the *Dickinson* case requires that a writ issue.

3. The subsequent selective service processing of appellant denied him due process of law when he was not given a personal appearance before the local board although a timely, written request was made. This is a denial of a substantial right and appellant was prejudiced thereby.
4. The subsequent selective service processing of appellant further denied him due process of law when his classification was not "reopened" after he had presented the standard evidence he was a father and therefore mandatorily entitled to a III-A Classification.

ARGUMENT

I.

A CLASSIFICATION BY A LOCAL BOARD IS INVALID WHEN NO CONSIDERATION HAS BEEN GIVEN TO THE EVIDENCE IN A REGISTRANT'S SELECTIVE SERVICE FILE.

This point does not encompass the question of whether there was a basis in fact for the IV-F classification. That question will be argued later in point II.

This point is concerned solely with whether the local board considered the claims and allegations of petitioner before classifying him. It is a point of first impression in selective service cases.

Ordinarily the presumption of official regularity disposes of any claim that a classification was merely a clerical act and not an exercise of judgment by the board.

In this case, however, the petitioner became armed with overwhelming evidence to rebut the presumption and to sustain his burden of proof.

As is seen from the selective service file the local board was early [before his induction] won over to the registrant's viewpoint and so expressed itself [Ex. pp. 63-64].

As is seen from the Transcript of Record the local board more strongly and actively endorsed his viewpoint after petitioner initially failed to secure a writ of habeas corpus; at this juncture he acquired the two board members as witnesses to establish the "new" point presented in his second petition for a writ [R. 124]. These two witnesses were the only board members in office January 23, 1950 when he was initially classified. They were still on the board and they came forward to help him in court after he failed to secure a writ on his first attempt. They were prepared to testify that his classification, because of conditions then prevailing, [pre Korea: no calls for selectees] was simply a clerical procedure and that they never saw the file before he was "classified". [R. 143].

Appellant claims this evidence was material on the following chain of reasoning:

A. Classifications must be based on a consideration of the claims and allegations before the local board; a classification made by a clerk, or by a board without considerations of the facts, is invalid;

B. The classification of January 23, 1950, classifying appellant in deferred Class IV-F was made without consideration of the facts.

C. The deferred classification of IV-F of January 23, 1950 was therefore invalid.

D. Extension of liability for service beyond the age of 26 could be made only on the basis of a *valid* prior deferred classification. Extension of appellant's liability for service was not valid, hence the Selective Service System lost jurisdiction to reclassify appellant I-A after he became age 26.

E. Reclassification of appellant as I-A was made after his 26th birthday.

F. Reclassification of appellant as I-A was not valid, nor was an order to report based on such classification.

Therefore, if appellant had been permitted to present his proffered evidence the court would have been required to grant him a writ.

A. A Classification Must Be Based on a Consideration of the Claims and Allegations Before the Local Board: A Classification Made by a Clerk, or by a Board Without Consideration of the Facts, Is Invalid.

Two vital matters are discussed in this sub-point:

1. All through the selective service regulations [32 C.F.R.] we find a regard expressed for the elementary requirement of due process that concerns us here, namely, that evidence presented must *be considered*.

In §1622.1, entitled General Principles of Classification we find, in subsection (c):

> "The local board will receive *and consider* all information pertinent to the classification of a registrant, presented to it." (emphasis added.)

In §1624.2, entitled Appearance Before Local Board we find the principle repeated, in its subsection (c):

> "(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall *consider* the new information which it receives and, . . ." (emphasis added.)

2. It is also clear from the regulations that *the board itself* classifies and that this most important function is not to be delegated to, or usurped by, a clerk. In §1622.1 (c) we find:

"(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed."

Section 1604.52, entitled Organization and Meeting, reads as follows:

"Each local board shall elect a chairman and a secretary. A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. In case of a tie vote on any question or classification, the board shall postpone action on the question or classification until it can be decided by a majority vote. If any member is absent so long as to hamper the work of the local board, the chairman of the local board shall recommend to the State Director of Selective Service that such member be removed and a new member appointed."

Cf. *United States v. Sage,* 118 F. Supp. 33, where the court takes cognizance of the fact that the following defect had to be cured:

". . . an unauthorized person had seconded a motion made in connection with defendant's classification by the local board." [34]

Although the matters involved, hereinabove, in subpoint A, are points of first impression it should need no further argument that classifying must be done *by*

the board and that the evidence in the file *must be considered* before classification. Also see *U. S. ex rel Accardi v. Shaughnessy,* 74 S. Ct. 499, 503-504: "Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations."

B. The Deferred Classification of January 7, 1950, Classifying Appellant in Class IV-F Was Made Without Consideration by the Board of the Facts and Was Made Solely by a Clerk.

This was the subject matter of the proffer of evidence made during the "second trial," before Judge Westover [R. 143].

C. The Deferred Classification of IV-F of January 23, 1950 Was Invalid.

This follows necessarily from sub-points A and B. The only objection which might be made is that appellant failed to appeal and, hence, failed to exhaust his administrative remedies. This is not true however, since no appeal was permitted.

A registrant's appellate rights under the selective service regulations differ somewhat from those of a litigant in a court of law. The regulations do not provide for appeals from "final orders", nor is there anywhere such a term as "appealable order", or any equivalent expression. Appeals permitted to selective service registrants are governed by the regulations, Part 1626—Appeal to Appeal Board [32 C.F.R. §1626.1 *et seq.*].

Section 1626.2 is entitled Appeal by Registrant and Others, and reads:

> "(a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition."

The purpose of such a provision is clear because of the necessarily inexact state of medical opinion.

In short, appeals in the selective service system are permitted *only from classifications* and, by special proviso, a Class IV-F classification is singled out as the one classification from which no appeal may be taken.

D. Extension of Liability for Service Beyond the Age of 26 Could Be Made Only on the Basis of a Prior Valid Deferred Classification. Extension of Petitioner's Liability for Service Was Not Valid, Hence, the Selective Service System Lost Jurisdiction to Reclassify Him in Class I-A After He Became Age Twenty-six.

As we learn from pages 63-64 of the Exhibit, and also see from the Minutes of Action entry on page 10 of the Exhibit the IV-F classification resulted in the Selective Service System taking the position that ap-

pellant's liability for military service was extended beyond his 26th birth date and to age thirty-five.

On October 30, 1951 General Lewis B. Hershey, Director of Selective Service sent all local boards an interpretation denominated Local Board Memorandum No. 38, and entitled: Subject: Extended Liability to Age 35 of Deferred Registrants. Therein, the General pointed out that Section 6(h) of the Universal Military Training and Service Act provided for such an extension of liability for 10 types of classifications, and he included Class IV-F in his listing.

Appellant does not contend that Class IV-F should not have been included in such listing. Appellant only contends that *classifying him in Class IV-F illegally* [by the clerk and without consideration of the facts] makes his extension of liability for service invalid.

As a further aid to the court, appellant presents the following portions of the Act (Public Law 51, 82nd Cong., approved June 19, 1951):

In Section 4(a) Training and Service in General, we find:

> "No person, without his consent, shall be inducted for training and service in the Armed Forces or for training in the National Security Training Corps under this title, except as otherwise provided herein, after he has attained the twenty-sixth anniversary of the day of his birth."

In Section 6(h), a section that includes the subject "Extension of Age of Liability," we find:

"*Provided further,* That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces or for training in the National Security Training Corps under the provisions of section 4(a) of this Act until the Thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons *if otherwise deferable* under any other provisions of this Act. The President is also authorized, under such rules and regulations as he may prescribe for the deferment from training and service in the Armed Forces or from training in the National Security Corps (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons *found to be* physically, mentally, or morally deficient or defective.
. . . No deferment from such training and service in the Armed Forces or training in the National Security Training Corps shall be made in the case of any individual *except upon the basis of the status* of such individual." (emphasis added.)

Granted that the court is satisfied that appellant never claimed the IV-F classification, that it was imposed on him by the clerk, that the board never considered the evidence (so that no doctrine of acquiescence or ratification of the clerk's action enters) and that no appeal was permitted it follows from a considera-

tion of the Act that the extension of his liability beyond age 26 was on an infirm basis.

E. Reclassification of Appellant in Class I-A Was Made After His 26th Birthday.

The undisputed facts are that appellant reached his 26th birthday on October 2, 1952 and that he was reclassified in Class I-A on October 7, 1952. See page 9 of the Exhibit for his birthdate and see page 10 of the Exhibit for the date of reclassification.

F. Reclassification of Appellant in Class I-A Under the Circumstances Was Not Valid, Nor Was an Order to Report Based on Such Reclassification.

There can be no dispute that the selective service system has no jurisdiction over registrants who reach their 26th birthday before an order to report for induction has been issued, unless the registrant's liability has been legally extended by virtue of the fact he has been in a deferred classification.

It is appellant's position that an illegally made classification, one that classifies a registrant into a deferred classification and one from which he had no appeal is void; that extension of liability on the basis of such classification is likewise void; that without a valid extension of liability a reclassification made past the age of 26 is likewise void; that an order to report based on a void classification is a nullity.

Although the decisions are now legion that an illegal classification deprives the board of jurisdiction to is-

sue a valid order to report for induction, none arose, until recently on the point that an Order to Report, issued after the registrant became 26, was invalid. *United States v. Shaw,* 118 F. Supp. 849, squarely points this out.

Appellant submits that the evidence proffered by him was material and that it, by reason of its source is persuasive and commands the issuance of a writ.

II.

THE IV-F CLASSIFICATION WAS ARBITRARY AND CONTRARY TO THE EVIDENCE THEN, OR AT ANY TIME, BEFORE THE BOARD. FOR THIS ADDITIONAL REASON IT CANNOT BE A BASIS FOR AN EXTENSION OF LIABILITY AND FOR A I-A CLASSIFICATION THAT IS MADE AFTER THE REGISTRANT PASSES HIS 26th BIRTH DATE.

No further argument is needed on the point that the IV-F classification was the cause of appellant's difficulties in that it, in extending his liability, gave color of law to the I-A classification made after his 26th birth date.

Therefore, if the court is satisfied that the IV-F was illegal, either because the evidence was not considered by the board (and/or was made solely by the clerk) as we argued in Point I, or because the classification had no basis in fact, as we now will argue, the conclusion is inevitable that *the action of classifying*

appellant in Class I-A was a nullity after the board lost jurisdiction to classify because its registrant had passed his 26th birth date.

No purpose would be served by citing the very numerous decisions, of all courts, holding that there must be a basis in fact for every classification. This is true in all instances, other than where a I-A classification is given. A board may give a registrant a I-A classification without any evidence in the file, after registration, because the law makes all registrants presumptively liable for I-A. But when the file contains evidence tending to support a claim for any other classification the board must have a basis in fact for the I-A. See *Dickinson,* 74 S. Ct. 153 and a host of others. Conversely, (and this is our present situation) when a file contains *evidence* that indicates a deferred classification *is not* claimed a deferred classification is improper if without basis in fact. Deferred classifications were not intended either to defer final consideration or to extend liability.

It is unfair as well as illegal to label a registrant a IV-F just because a IV-F classification can be reconsidered at all times. It is equally unfair as well as equally illegal to label a registrant IV-F for the purpose of extending his liability, when done regardless of the facts. We are not arguing that the latter is why the IV-F was given but it certainly can be said, in all fairness, that the former reason is probably the correct one. In any event the reason is immaterial.

The bald fact is that appellant, by reason of the ill-considered action of the clerk did have his liability extended. If, as we now charge, the action was ill-considered [without basis in fact] then it becomes immaterial who classified him or why.

An inspection of the evidence in the file can lead to only one conclusion, and that is the one reached by the local board *itself* when it, for the first time, took a straight look at the file:

> ". . . his attorney had advised him that his liability has been extended in error, due to the fact that at no time prior to his 26th birth date, did he claim deferment, and also his request that his physical condition be verified was not fulfilled until after his 26th birth date.
>
> "After careful review of this evidence, this Local Board feels that this might well be the case, and would hesitate to enforce an order for induction, in error." [Ex. p. 64].

The chief item in the file on this point is that appellant never claimed a IV-F, directly or indirectly.

The selective service form (Classification Questionnaire, SSS Form No. 100) provides for the assertion of a classification claim by the registrant. It specifically informs him [Ex. p. 10] that "The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, . . ."

The regulations specifically provide:

> "The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the latest

> address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A." (underscoring supplied) [32 C.F.R. §1622.1 (c)].
>
> "In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class." [32 C.F.R. §1622.10].

It needs no argument that the requirement "to the satisfaction of the local board" does not give the local board jurisdiction to classify by whim, or without basis in fact.

What were the facts presented? They are all found on page 10 of the Exhibit (originally page 7 of SSS Form No. 100). In addition to the fact that appellant did not claim a IV-F classification it is important to observe that he said NO to the question: Do you have any physical or mental condition, which, in your opinion, will disqualify you from service in the Armed Forces? Also, it is to his credit that he submitted the whole truth, although not explicitly ordered, and revealed the circumstances of his separation from the naval forces, the alleged punctured eardrum. He specifically and flatly asserted, immediately after this disclosure, that "Later examination showed no such

condition." All his other statements and answers are consistent with the assertion and the fact of his perfect health and with the fact that no claim for a deferment was being asserted.

From the standpoint of his health and fitness, the more legal and sensible thing for the classifying clerk to have done was to have classified appellant in class I-A, assuming she was justified in neither having the board classify him or having his physical condition checked. It is a fact, and common knowledge, that no registrants were being inducted in January 1950, nor until after Korea. Class I-A was not only the legally correct classification but was then, very much a true "tentative" classification, in fact, even today is the only true tentative classification. All others must be based on specific facts, whereas I-A is permissible in the absence of any facts, after initial jurisdiction is acquired.

Although the purpose of the Selective Service System is to raise an army the System is required to obey the law and its own regulations and must classify accordingly.

To paraphrase *Dickinson v. United States, supra:* The courts may properly insist that there be some proof to support the classification [157]; when the uncontroverted evidence places him *prima facie* in a classification, suspicion or speculation may not be used as a basis to place him in another [158]. The dissenting opinion emphasizes the duty of the board:

> "Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case—evidence which is then put to the test of substantiality by the courts. In short, the board must build a record." [159].

Appellant submits that the local board was required to "build a record" as the appellant himself suggested on page 10 of the Exhibit. Since no such record was built [it is safe to say none could have been built] there is no basis in fact here that meets the standard required by *Dickinson.*

III.

THE LOCAL BOARD FRUSTRATED PETITIONER FROM SECURING AN IMPORTANT PROCEDURAL RIGHT, NAMELY, A PERSONAL APPEARANCE BEFORE THE LOCAL BOARD (WITH THE COROLLARY RIGHT TO AN APPEAL THEREAFTER SHOULD THE DECISION BE ADVERSE) ALTHOUGH HE HAD MADE A TIMELY, WRITTEN REQUEST. THIS WAS A DENIAL OF DUE PROCESS.

It is too well established to require argument that the deprivation of a procedural right as important as a personal appearance before the local board, after a timely, written request is a denial of due process and invalidates subsequent action. *Knox v. United States,* 200 F. 2d 398, although not directly in point is a decision of this court on a closely related deprivation.

The controlling fact is that on October 14, 1952 appellant complained of the I-A reclassification given him seven days earlier. His letter should be read by the court for it states his case more eloquently than counsel can [Ex. pp. 25-28]. Its excellent chirography makes it easy reading, in contrast to the letters generally found in selective service files.

Pertinent to the point presently being argued the letter requests an appeal and a personal appearance hearing, both avenues of relief being open to him under the regulations, as will be hereafter shown. The opening paragraph of the letter was direct and clear:

> "I wish this to serve as my notice of appeal from my classification into I-A. Since my appeal is based on circumstances extending over the last 5 years, I would have preferred to appear before you to relate the circumstances more fully. However, the distance and expense present difficulties. However, after reviewing this appeal, I will be glad to appear in person." (underscoring supplied). [Ex. p. 25].

The evidence showed that the local board, although it did (as requested) review the file on October 22, 1952, immediately thereafter sent the file to the Appeal Board *without giving petitioner the requested opportunity for a personal appearance.* Petitioner has never had an Appearance Before Local Board [Ex. p. 11, Minute Entries]. Petitioner's clear desire was for an opportunity to appear before the board if the more

economical letter (he was 3,000 miles away) didn't convince them.

The court has doubtless frequently observed, and should take judicial notice of the following selective service practice: A communication comes into the office and the clerical procedure is to red-pencil certain phrases and/or to make red-pencil marginal notes to indicate how the communication is to be filed, answered, and otherwise handled. Invariably a letter requesting an appeal has the word or expression of appeal underlined. Frequently, a letter containing one or more *additional* requests does not have the "unimportant" [this is obviously the clerk's decision] parts underlined. Thus, the requests of "lesser importance" may be lost in the shuffle, as here. Note [see pp. 25-28 of the exhibit] that as a result of his October 14th letter he received the "requests" that are underlined, namely, an appeal and an investigation of both his IV-F situation and of his "dependency" situation:

1. His file was sent to the Appeal Board [Ex. p. 10];
2. The dependency situation was given an investigation [Ex. pp. 57-62];
3. The board itself, for the first time "saw" the IV-F situation and was won to his side [Ex. pp. 63-64].

But his unmistakable desire for an opportunity to "relate the circumstances more fully" was ignored. Why? Clearly because the clerk never gave the board

a chance to set a date. Although there is no *direct* evidence on this the circumstantial evidence should make this conclusion acceptable and make any other unacceptable.

The regulations give the registrant the right, at an appearance before local board to

1. "discuss his classification;"
2. "point out the class or classes in which he thinks he should have been placed;"
3. "direct attention to any information in his file which he believes the local board has overlooked;"
4. "present such further information . . ."

The full regulation, in the version in effect all during 1952, is found in Appendix 1.

In conclusion, it is submitted that the deprivations appellant suffered when the board, after reviewing the file on October 22, 1952 [Ex. p. 10] immediately sent the file to the Appeal Board, are obvious from the above and more so when we see, by subsection (e) of §1624.2 that he was deprived of an appeal based on a file that included what would have transpired at the Appearance Before Local Board.

IV.

THE LOCAL BOARD FAILED TO REOPEN APPELLANT'S CLASSIFICATION, AND CLASSIFY HIM ANEW, WHEN HE PRESENTED THE STANDARD EVIDENCE SHOWING THAT HE WAS A FATHER, AND THEREFORE MANDATORILY ENTITLED TO A III-A CLASSIFICATION. THIS WAS A DENIAL OF DUE PROCESS.

Nearly all selective service deferred classifications require the exercise of some degree of judgment by the local board. There is always some question concerning a registrant's conscientious objections to war, or whether his evidence meets the various occupational standards imposed, or whether his claim for a "hardship III-A" classification meets the "extreme hardship" test. However, the "father's III-A" classification, according to the standard imposed at all times applicable to this appellant, was mandatorily required once the standard evidence was submitted, absent a question of forgery. The standard evidence is filing "with the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based." [1622.30 (2) (a)].

Appellant submitted the required evidence [Ex. pp. 31-33]. It was sent as soon as appellant received the Order to Report for Induction [Ex. p. 30]. Appellant's covering letter [Ex. p. 31] explains why the evidence

had not been sent before. If the board had received this "mandatory" evidence *before* it issued the Order to Report for Induction it doubtless would never have issued the Order but would have reclassified Appellant in Class III-A. See page 35 of the Exhibit which is a request for postponement of induction by the chief clerk of the board (Group Coordinator for all the boards officed with appellant's board); it is based on the "extreme hardship" feature of his evidence, not on the "fatherhood" feature, unquestionably because of the regulation's proviso that the evidence of fatherhood must be filed "prior to the time the local board mails him an Order to Report for Induction which is not subsequently cancelled for a reason not related to the filing of the certificate hereinafter mentioned. . . ." [§1622.30 (a)].

The Order to Report *was* "postponed" [Ex. p. 39] as soon as the Chief Clerk's (Group Coordinator's) request was received but this action may not meet the definition of "cancellation"; nevertheless, the postponement was "for a reason not related to the filing of the certificate." Cf. *United States v. Parker,* 200 F. 2d 540, 541.

Appellant submits, additionally, that the proviso in the last quoted regulation, as construed and applied to him, is contrary to the Act.

Although the board (and doubtless the clerk too) came to have a sympathetic attitude towards appellant, its construction of this regulation was too literal.

This harshly bureaucratic construction is in sharp contrast to the board's prior construction of the regulations and thus deserves passing attention in a consideration of this topic:

1. In 1950, when appellant was classified, and in 1951 (until 28 September 1951) the regulation pertaining to the III-A deferred "dependency" classification read as follows:

> "CLASS III-A: REGISTRANTS WITH DEPENDENTS.—(a)
> "In Class III-A shall be placed (1) a registrant who has a wife or child with whom he maintains a bona fide family relationship in their home; or (2) a registrant whose induction into the armed forces would result in hardship and privation to a person dependent upon him for support." [§1622.15].

It is beyond dispute that during this period, the fact of being a husband in a bona fide family relationship was alone sufficient to make mandatory the III-A Classification, although local boards, following directives from the National Director and State Directors did not think so. See *Ex parte Barrial,* 101 F. Supp. 348.

Although it is indisputable [see page 16 of Exhibit] that the board had evidence that appellant was married during this period it did not then or ever place him in Class III-A.

2. In 1950, 1951 and up to the present, the regulation [§1622.25] pertaining to the II-S deferred "student" classification has been substantially the same. It is comparatively long (114 printed lines) and need not be set forth inasmuch as there probably will be no dispute but that appellant qualified as a full time student. However, he was never given a II-S classification although the board at all times (see p. 5 in Exhibit) knew this.

3. On 28 September 1951 the regulation with respect to the III-A family hardship deferred classification was changed from requiring the status of a husband to requiring the status of a father. "Father" was defined as starting with conception.

Suffice it to say that the local board never changed the classification of appellant, at any time, until after he was 26 years old, and then only to the I-A classification.

When a registrant presents evidence for any deferred classification, and that evidence is unrebutted, it may not be disregarded.

Dickinson v. United States, supra.

So, here we have a situation where the registrant had present in his file evidence for various deferred classifications and all of it was ignored. Then, when he presents evidence for a deferred classification on the basis of fatherhood he is blocked by a literal interpretation of the regulations.

Such a literal interpretation is contrary to the intent of Congress. Congress unquestionably intended that families be preserved and that fatherhood be rewarded with a deferment. Congress set no deadlines for the presentation of evidence. The regulation setting a deadline is an alteration of the legislative intent. It defeats the intent of Congress. True, this particular deadline makes administration easier than the natural deadline of induction. The courts however, should not favor such an artificial deadline. At least one court has so intimated:

> "We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by Sec. 5(h) of the Act, which provides that 'No . . . exemption or deferment . . . shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to a deferment." (under-

scoring supplied). *Hull v. Stalter,* 151 F. 2d 633, 635.

At least one court has squarely decided that such a proviso is contrary to the intent of Congress. In the case of *United States v. Crawford,* No. 33742, N.D. Calif. S.D., decided February 5, 1954 the court was faced with a factual and legal situation identical in principle with this appellant's. The entire decision, with its footnotes, is as follows:

"Defendant was indicted for violation of Sec. 12a, Universal Military Training and Service Act, 50 USC App. 462a, after having refused to submit to induction into the Armed Services pursuant to an order of his local draft board.

"Defendant registered with his Selective Service Board on October 13, 1948 and was classified "1-A" on August 22, 1950. Thereafter, he was repeatedly deferred, first because he was a student and later because he enlisted in a component of the Active Military Reserve. On February 19, 1952, defendant was again classified "1-A" and on June 13, 1952, he received an "Order to Report for Induction" with a concurrent postponement of induction for one year. Thereafter, on April 14, 1953, defendant for the first time claimed that he was a conscientious objector and filled out the appropriate forms soon thereafter. The Board declined to reopen defendant's classification and the events giving rise to the indictment thereupon followed.

"It is clear that exemption from military service is not a constitutional right but merely a mat-

ter of legislative grace.[1] The statute, however, expressly provides that an individual claiming conscientious objection is entitled to have the character and good faith of his objections evaluated at a hearing before the local board and, if his claim is not sustained, by appeal to an appropriate appeal board and reference of the case to the Department of Justice for additional hearing.[2] Selective Service System Regulation 16252, on the basis of which the local board declined to reopen defendant's case, provides that " . . . the classification of a registrant shall not be reopened after the local board has mailed to the registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

"It being clear that a postponement of induction does not invalidate an outstanding Order of Induction,[3] the sole legal question before the Court is whether an executive regulation may circumvent the clear language of the statute. To pose the question is to answer it.[4] While Regulation 16252 is not invalid on its face, it can have no applicability to a claim of conscientious objection, whenever made, so as to deprive the objector of a hearing at which he may prove his good faith.

---

[1]George v. United States, 196 F. 2d 445 (9th Cir. 1952), cert. denied, 344 U. S. 843.

[2]Universal Military Training Act of 1948, sec. 6(j), 50 U. S. C. App. sec. 456(j) as amended June 19, 1951, 65 Stat. 83.

[3]Selective Service System Regulation 1632(d).

[4]See U. S. v. Clark, 105 F. Supp. 613, 615 (W. D. Penn. 1952).

"No such hearing having been afforded defendant, the United States has not met the conditions precedent to a prosecution for draft evasion.

"The defendant stands acquitted.

"So ordered.

Dated: February 5th, 1954.

s/Edward P. Murphy

UNITED STATES DISTRICT JUDGE

(ENDORSED)

FILED

FEB -5 1954

C. W. Calbreath, Clerk"

The *Clark* case, referred to in the above opinion, deals more specifically with a registrant's right to appellate consideration but the decision's construction of Congressional intent is in point:

"Although the regulations, literally construed, tend to support this position, we think that a right of appeal does exist in this case. An Act of Congress creates that right without any express limitation, and it seems unreasonable to hold that Congress intended the right of appeal to exist only where the claim for exemption as a conscientious objector was considered at the time of the initial classification. This would be the result in effect if we accept the Government's contention. The right of appeal would exist only in cases where the claim is considered at the time of the initial classification; in all other instances the local board would be able to determine whether a claimant should have an appeal merely by framing its order

as a refusal to reopen the original classification rather than an order granting a reopening of the classification on which a hearing would be held and the right of appeal from an adverse determination granted. The defendant in his testimony during the trial of this case admitted that he did not have this conviction until some time after his classification. If Congress had intended that the right of appeal from the refusal of a claim for exemption based on conscientious objections to military service should be granted only to those persons who had the conviction at the time of the registration and initial classification, it would have been a simple matter to so provide in the statute." (underscoring supplied). [615].

The Third Circuit had a similar problem of construction in *Berman v. Craig,* 207 F. 2 888

"Sections 1625.1 and 1625.2 of the Regulations[5] taken together require a local board to consider anew the classification of a registrant who reports, within 10 days after it occurs, a change in his status which may require his reclassification[6]. This it is the board's duty to do even though, as here, an order to report for induction has been sent to the registrant, provided he has not yet been inducted. Such a timely report was made to the local board in this case by Berman through his telegram of July 3, 1952, supplemented and corroborated by the letter of July 8th from the theological school. It is true that the telegram used the word 'appeal'. But this did not justify the board in regarding it as solely an appeal in the

technical sense or in wholly ignoring the changed draft status which it disclosed. Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel.[7] The local board should have given consideration to Berman's change of status and determined whether it

required his reclassification. Its failure to do so deprived him of an important procedural right to which he was entitled.[8]'' (underscoring supplied). [891).

CONCLUSION

A selective service registrant should always be able to show, if he has evidence available, that the local board members never gave his file any consideration whatsoever when classifying him, especially when that classification, as is true here, resulted in an extension of his liability for service beyond age twenty-six.

Every classification, other than a I-A must be based on facts in the registrant's file. There were none for the IV-F classification that extended his liability.

The failure to give appellant a personal appearance flouted his expressed, timely, written request and was a denial of due process.

His I-A classification should have been reopened when he presented the standard fatherhood evidence so that the mandatory III-A ''father's'' classification could be given him.

By reason of the above and each of them, the judgment of the district court should be reversed and a writ should issue.

Respectfully,

J. B. TIETZ
Attorney for Appellant.

Appendix

APPENDIX ONE

PART 1624—APPEARANCE BEFORE LOCAL BOARD

1624.2 Appearance Before Local Board.—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the "Minutes of Actions of Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, or determines not to reopen the registrant's classification, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

(e) Each such classification or determination not to reopen the classification made under this section shall be followed by the same right of appeal as in the case of an original classification.

N. 2886

No. 14221

United States
Court of Appeals
for the Ninth Circuit

ALICE E. COHN, MARION A. COHN, DANIEL E. COHN and EDGAR M. COHN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 10-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

EDWARD L. CONROY, ESQ.

For Respondent:

DONALD P. CHEHOCK, ESQ.

The Tax Court of the United States
Docket No. 25603

EDGAR M. COHN,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1949

Oct. 31—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 2—Copy of petition served on General Counsel.

Dec. 13—Answer filed by General Counsel.

Dec. 13—Request for hearing in Los Angeles, Calif., filed by General Counsel.

Dec. 22—Notice issued placing proceeding on Los Angeles calendar. Service of answer and request made.

1951

Oct. 8—Hearing set December 3, 1951, Los Angeles, Calif.

Dec. 5 & 6—Hearing had before Judge Harron on merits, cases consolidated for hearing, stipulation of facts and supplementary stipulation of facts filed at hearing. Briefs 1/21/52: Replies 2/18/52.

1952

Jan. 4—Transcript of hearing 12/5/51 filed.

Jan. 4—Transcript of hearing 12/6/51 filed.

Jan. 4—Transcript of hearing 12/10/51 filed.

Jan. 15—Motion for extension to March 17, 1952 to file brief, filed by General Counsel. 1/16/52. Granted.

1952

Jan. 16—Motion for extension to March 17, 1952, to file brief, filed by taxpayer. 1/16/52—Granted.

Mar. 13—Motion for extension to March 31, 1952, to file brief, filed by General Counsel. 3/17/52. Granted.

Mar. 14—Brief filed by taxpayer.

Mar. 20—Stipulation to correct transcript, filed.

Mar. 28—Brief filed by General Counsel.

Mar. 31—Taxpayer's brief served on General Counsel.

Apr. 21—Motion for extension to May 15, 1952, to file Reply brief, filed by taxpayer. 4/21/52—Granted.

May 14—Reply brief filed by taxpayer. (p) Copy served.

1953

Oct. 20—Findings of fact and opinion rendered. Judge Harron. Decision will be entered for the respondent. Copy served.

Oct. 26—Decision entered. Judge Harron. Div. 13.

Dec. 28—Petition for review by U. S. Court of Appeals for the Ninth Circuit, filed by taxpayer.

1954

Jan. 18—Notice of filing petition for review with service acknowledged thereon, filed by taxpayer.

Jan. 18—Designation of contents of record on review with service acknowledged thereon, filed by taxpayer.

The Tax Court of the United States

Docket No. 25603

EDGAR M. COHN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency LA:IT:90D:LHP dated September 27, 1949, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual whose residence is Beverly Hills, California, and whose mailing address is 176 N. Martel Avenue, Los Angeles 36, California. The return for the period here involved was filed with the collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on September 27, 1949.

3. The taxes in controversy are income taxes for the calendar years 1945 and 1946 and in the amount of $9,139.55.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

Determination by the respondent that profits derived from the sale of real estate used to produce rental income constituted ordinary income and not capital gain.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) The income of this petitioner upon which the deficiency is based is his distributable share of income of a partnership conducted under the name of Security Construction Company. The partnership was formed on May 21, 1942, for the purpose of constructing and selling residences. A number of these residences were constructed and sold in the years 1942 and 1943. Upon completion of the first project, it was decided to embark upon a second similar project. Application was made to the proper Federal Agency for priorities for materials, and the partners were advised that none would be granted except to construct multiple units which were required to be offered for rent for a period of 90 days before any could be offered for sale. The partners then decided to construct the multiple residences under the restrictions imposed and to rent them indefinitely for the purpose of producing income, and not to offer them for sale.

(b) The first building was completed in February, 1944, and the last was completed in June, 1944.

Rental was accomplished in most cases before completion. In January of 1945, conditions had changed so that extensive rental vacancies were considered imminent and the partners then decided to dispose of the entire group of rented buildings. Sale of all the property was accomplished in the year 1945, and in reporting the sales, they were treated as capital assets, all having been rented for more than six months, with proper cost basis adjustment for depreciation sustained, under the provisions of Section 117 (j) of the Internal Revenue Code.

(c) The tax deficiency asserted by the respondent for the year 1946 is on deferred profits realized in that year on sales made in 1945, referred to in sub-paragraph (b) above.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that the profits in question are properly taxable as long-term capital gains under the provisions of Section 117 (j) of the Internal Revenue Code.

/s/ EDWARD L. CONROY,
Counsel for Petitioner.

EXHIBIT A

Form 1279 (rev. July 1948) (Seal)

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:LHP

Sept. 27, 1949.

Mr. Edgar M. Cohn,
176 North Martel Avenue,
Los Angeles 36, California.

Dear Mr. Cohn:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1945, and December 31, 1946, discloses a deficiency of $9,139.55, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

With 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in Charge.

LHP:vme
Enclosures:
Statement
Form of waiver

Statement

LA:IT:90D:LHP

Mr. Edgar M. Cohn
176 North Martel Avenue
Los Angeles 36, California

Tax Liability for the Taxable Years Ended
December 31, 1945, and December 31, 1946

Year	Deficiency
1945 Income tax	$ 8,051.34
1946 Income tax	1,088.21
Total	$ 9,139.55

In making this determination of your income tax liability careful consideration has been given to the reports of examination dated July 13, 1948, and May 16, 1949, to your protests dated October 6, 1948, and June 21, 1949, and to the statements made at the conferences held.

The Security Construction Company, a partnership engaged in the real estate business, in which you were a partner, constructed multiple-dwelling buildings during 1944 and sold all of them in the taxable year 1945. The profits derived from the sale of such buildings are held to constitute ordinary income and not capital gain for the reason that the properties in question were held by the said partnership for sale to its customers in the ordinary course of its business. Accordingly, the amount of your distributive share of the partnership income, for each of its taxable years ended December 31, 1945, and December 31, 1946, has been adjusted and increased, as shown below, to give effect to the foregoing determination:

	1945	1946
Ordinary net income as disclosed by partnership return	$ 44,703.83	$ 39,564.60
Add: (1) Profits from sales of above-mentioned properties	142,836.87	27,447.35
Ordinary net income adjusted	$187,540.70	$ 67,011.95
Your distributive share	$ 93,770.35	$ 33,505.97

Explanation

	1945	1946
(1) Gross receipts	$166,089.63	$ 27,831.23
Less: Selling expenses (deductible in 1945 when incurred)	$ 22,886.95	$ -0-
Allocation of cost, Lot 23, Tract 13170	365.80	383.88
Total	$ 23,252.75	$ 383.88
Net profit	$142,836.87	$ 27,447.35

A copy of this letter and statement has been mailed to your representative, Mr. Edward L. Conroy, 1680 North Vine Street, Los Angeles 28, California, in accordance with the authorization contained in the power of attorney executed by you.

Adjustments to Net Income
Taxable Year Ended December 31, 1945

Net income as disclosed by return	$ 50,988.02
Additional income:	
(a) Income from partnership increased	40,708.14
Total	$ 91,696.16
Reduction of income:	
(b) Net gain from sale or exchange of capital assets decreased	37,520.38
Net income adjusted	$ 54,175.78

Explanation of Adjustments

(a) For the reason previously explained, income from the partnership, Security Construction Company, is increased by the amount of $40,708.14, which is computed as follows:

Your distributive share of ordinary net income of partnership, as previously determined herein	$ 93,770.35

Average invested capital:		
Separate	$ 29,279.53	
Community	43,260.08	$ 72,539.61
Fair return on invested capital:		
Separate (8% of $29,279.53)	$ 2,342.36	
Community (8% of $43,260.08)	3,460.81	$ 5,803.17
Salary		12,000.00
Total		$ 17,803.17
Per cent representing separate property ($2,342.36/$17,803.17)		13.16%
Per cent representing community property ($3,460.81 plus $12,000.00/$17,803.17)		86.84%

Allocation of Income:

Separate property:	Total	Husband	Wife
13.16% x $93,770.35	$12,340.18	$ 12,340.18	$ None
Community property:			
86.84% x $93,770.35	81,430.17	40,715.09	40,715.08
Totals	$93,770.35	$ 53,055.27	$ 40,715.08
Amount included in your return		12,347.13	
Increase		$ 40,708.14	

(b) Your distributive share of a net gain realized from the sale or exchange of capital assets by the previously-named partnership has been determined in the amount of $52.25, in lieu of $37,572.63 as reported in your return, or a decrease of $37,520.38. The amount of $52.25 is computed as follows:

	Short-term	Long-term
Net gain, per partnership return	$ 312.30	$ 74,832.95
Deduct: Amounts held to represent ordinary income	332.30	74,708.45
Net gain (loss), adjusted	($ 20.00)	$ 124.50
Your distributive share	($ 10.00)	$ 62.25
Net gain from sale or exchange of capital assets ($62.25-$10.00)		$ 52.25

Computation of Alternative Tax
Taxable Year Ended December 31, 1945

Net income adjusted		$ 54,175.78
Less: Excess of net long-term capital gain over net short-term capital loss		52.25
Ordinary net income		$ 54,123.53
Less: Surtax exemptions		1,000.00
Balance (surtax net income)		$ 53,123.53
Surtax on $53,123.53		$ 29,162.65
Ordinary net income	$ 54,123.53	
Less: Normal tax exemption	500.00	
Balance subject to normal tax	$ 53,623.53	
Normal tax (3 per cent of $53,623.53)		1,608.71
Partial tax		$ 30,771.36
Plus: 50 per cent of $52.25		26.13
Alternative tax		$ 30,797.49

Computation of Tax
Taxable Year Ended December 31, 1945

Net income adjusted	$ 54,175.78	
Less: Surtax exemptions	1,000.00	
Surtax net income	$ 53,175.78	
Surtax		$ 29,201.84
Net income adjusted	$ 54,175.78	
Less: Normal-tax exemption	500.00	
Net income subject to normal tax	$ 53,675.78	
Normal tax at 3%		1,610.27
Total normal tax and surtax		$ 30,812.11
Alternative tax		$ 30,797.49
Correct income tax liability		$ 30,797.49
Income tax liability shown on return, account No. 3042259		22,746.15
Deficiency of income tax		$ 8,051.34

Adjustments to Net Income
Taxable Year Ended December 31, 1946

Net income as disclosed by return	$ 19,669.65
Additional income:	
(a) Income from partnership increased	8,414.69
Total	$ 28,084.34
Reduction of income:	
(b) Net gain from sale or exchange of capital assets	6,293.08
Net income adjusted	$ 21,791.26

Explanation of Adjustments

(a) For the reason previously mentioned, income from the partnership, Security Construction Company, is increased by the amount of $8,414.69, which is computed as follows:

Your distributive share of ordinary net income of partnership, as previously determined herein		$ 33,505.97
Average invested capital:		
Separate	$ 29,279.53	
Community	25,816.35	$ 55,095.88
Salary		$ 10,000.00
Fair return on invested capital:		
Separate (8% of $29,279.53)	$ 2,342.36	
Community (8% of $25,816.35)	2,065.31	4,407.67
Total		$ 14,407.67
Per cent representing separate property ($2,342.36/$14,407.67)		16.26%
Per cent representing community property ($2,065.31 plus $10.000.00/$14,-407.67)		83.74%

Allocation of income:

	Total	Husband	Wife
Separate property:			
16.26 x $33,505.97	$5,448.07	$ 5,448.07	$ None

Community property:			
83.74 x $33,505.97	28,057.90	14,028.95	$ 14,028.95
Totals	$33,505.97	$ 19,477.02	$ 14,028.95
Amount included in your return		11,062.33	
Increase		$ 8,414.69	

(b) The amount of $6,293.08 included in your income as representing your distributive share of a net capital gain realized by the aforementioned partnership from the sale of multiple-dwelling buildings is eliminated from income for the reason previously given.

Computation of Alternative Tax
Taxable Year Ended December 31, 1946

Net income adjusted		$ 21,791.26
Less: Excess of net long-term capital gain over net short-term capital loss		81.25
Ordinary net income		$ 21,710.01
Less: Exemptions		1,000.00
Balance, subject to surtax and normal tax		$ 20,710.01
Tentative surtax	$ 7,036.31	
Tentative normal tax at 3%	621.30	
Total tentative tax	$ 7,657.61	
Less 5%	382.88	
Partial tax		$ 7,274.73
Plus: 50 per cent of $81.25		40.63
Alternative tax		$ 7,315.36

Computation of Tax
Taxable Year Ended December 31, 1946

Net income adjusted	$ 21,791.26
Less: Exemptions	1,000.00
Balance, subject to surtax and normal tax	$ 20,791.26

Tentative surtax	$ 7,079.37	
Tentative normal tax at 3%	623.74	
Total tentative tax	$ 7,703.11	
Less 5%	385.16	
Total normal tax and surtax		$ 7,317.95
Alternative tax		$ 7,315.04
Correct income tax liability		$ 7,315.36
Income tax liability shown on return, account No. 9121860		6,227.15
Deficiency of income tax		$ 1,088.21

Duly verified.

Received and filed October 31, 1949, T.C.U.S.

Served November 2, 1949.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. Denies that the respondent erred as alleged in paragraph 4 of the petition.

5(a). Admits the allegations contained in the first four sentences of subparagraph (a) of paragraph 5 of the petition and denies the remaining allegations contained in said subparagraph.

(b). Admits that the sale of all of the property was accomplished in the year 1945, and in reporting the sales, they were treated as capital assets under the provisions of Section 117(j) of the Internal Revenue Code, as alleged in subparagraph (b) of paragraph 5 of the petition and denies the remaining allegations contained in said subparagraph.

(c). Admits the allegations contained in subparagraph (c) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
H. A. MELVILLE,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed December 13, 1949. T.C.U.S.

The Tax Court of the United States

Dockets Nos. 25600, 25601, 25602, 25603

ALICE E. COHN, et al.,[1]

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

Promulgated October 20, 1953

Security Construction Company, a partnership organized in May, 1942, built houses for sale before war time controls of private housing went into effect in February, 1943. It received priorities to build multiple unit houses which it intended to sell under N.H.A. regulations, and, later, to build single unit houses which it intended to sell upon completion. All of the defense housing, 178 houses, was completed in 1944, and 109 single unit houses were sold in 1944. Sixty-nine multiple unit houses were rented in 1944, and all were sold in 1945. Upon the evidence, held, that the partnership was engaged in the business of building houses for sale and selling houses in 1943, 1944, and 1945; that it did not enter into a new business in 1944 of renting houses for investment; that the 69 houses sold in 1945 were not capital assets but were houses built and held for sale,

[1]Consolidated with Alice E. Cohn, Docket No. 25,600, are Marion A. Cohn, Docket No. 25601; Daniel E. Cohn, Docket No. 25602; and Edgar M. Cohn, Docket No. 25603.

were rented only pending sale, and were held primarily for sale to customers in the ordinary course of business; and that the gain reported on an installment basis in 1945 and 1946 is taxable as ordinary income. Nelson A. Farry, 13 T.C. 8; Victory Housing No. 2, Inc., ... F. 2d ....; and Walter R. Crabtree, et al., 20 T.C. ...., distinguished.

EDWARD L. CONROY, ESQ.,
For the Petitioners.

DONALD P. CHEHOCK, ESQ.,
For the Respondent.

The Commissioner determined deficiencies in income tax for the years 1945 and 1946 as follows:

Docket No.	Petitioner	1945	1946
25600	Alice Cohn	$ 6,810.12	$ 1,835.48
25601	Marion Cohn	18,468.73	1,967.24
25602	Daniel Cohn	23,018.25	1,198.96
25603	Edgar Cohn	8,051.34	1,088.21

The question to be decided involves the sales of multiple dwelling houses which were sold in 1945 by a partnership, the Security Construction Company, in which the petitioners Daniel and Edgar Cohn are partners. The petitioners Alice and Marion Cohn are involved only because they report income on a community property basis. The year 1946 is involved because the partnership reported sales on an installment basis.

The question to be decided is whether 69 houses sold in 1945 by the Security Construction Company were held primarily for sale to customers in the

ordinary course of business, as the respondent has determined, so that the gains upon sales were ordinary income; or whether the houses in question were capital assets, as defined in sections 117(a)(1), and 117(j) of the Code, as petitioners contend, so that long-term capital gains were realized.

The petitioners filed their returns with the collector for the sixth district of California.

Findings of Fact

The facts which have been stipulated are found as facts. The stipulations of facts are incorporated herein by this reference.

Edgar and Marion Cohn, and Daniel and Alice Cohn are, each, husband and wife. Edgar and Daniel are brothers. Daniel and Alice Cohn were married on June 5, 1945. All were residents of California during the taxable years, and each filed a separate income tax return for 1945 and 1946 in which income was reported on a community property basis. For convenience, Edgar and Daniel are referred to hereinafter as the petitioners.

The petitioners are the sons of Max Cohn. Max Cohn and petitioners owned the stock in the corporation, Security Construction Co., Inc., which, in 1941, subdivided land in the area, "Beautiful Glenwood," near Burbank, and built thereon 66 single family houses. The houses were held for sale to customers and they were sold in 1941 and 1942 upon completion. Tracts of land which are numbered 13170, 13171, and 13172 are involved in these proceedings and they are adjacent to and near the tract on which the corporation built 66 houses for sale in 1941.

On May 21, 1942, Edgar and Daniel formed a partnership, Security Construction Company, referred to hereinafter as "the partnership," in which they were equal partners. The business of the partnership in its income tax returns for the years 1942 to 1946, inclusive, is stated to be "real estate"; and the business of the petitioners in their individual returns for 1945 and 1946 is stated to be "real estate."

The partnership acquired tract number 13172, as acreage, on May 25, 1942. It acquired tract number 13170, subdivided into 56 lots, on September 28, 1943. It acquired tract number 13171, subdivided into 132 lots, on January 21, 1944. The three tracts of land were acquired from Max Cohn. They are located about three-quarters of a mile from the Lockheed Aircraft Corporation plant.

The partnership engaged in its business from May 21, 1942, until about April 1, 1946, after which date it was inactive. During the period of active business in the years 1942 to 1946, inclusive, the partnership built and sold 324 houses, of which 253 were single unit houses, and 71 were multiple unit houses. Prior to their sale 69 of the multiple unit houses, which are involved in these proceedings, were rented. The net profit from sales and the net rents received by the partnership in the years 1942 to 1946 were as follows:

Year	Houses Sold	Single Units Sold	Multiple Units Sold	Net Profit, Sales	Net Rents
1942	21	21	-0-	$ 15,035	-0-
1943	109	109	-0-	73,349	-0-
1944	109	109	-0-	111,436	$28,793
1945	69	-0-	69	238,329	8,425
1946	16	14	2	64,835	745
Total	324	253	71	$502,984	$37,963

By August 26, 1942, tract 13172 was subdivided by the partnership into 132 lots. During 1942 and 1943, the partnership built 130 single family houses in that subdivision. All of the houses were sold immediately upon completion; 21 houses were sold in 1942 for a net profit of $15,035; and 109 houses were sold in 1943 for a net profit of $73,349. All of these houses were built for sale to customers in the ordinary course of the partnership's business. The partnership reported the gain from the sales as ordinary income, on the installment basis. The sales of the houses were made by a real estate broker who devoted his full time to the work, with the help and cooperation of the partnership. The broker received a commission of $30 for each house sold. The partnership bought two buildings adjoining the tract, in 1941 and 1942, for the transaction of business, which it kept until 1946. Edgar Cohn and various real estate brokers used these buildings in their work.

During the war years Edgar Cohn made continuous inquiries of the local offices of the Federal Housing Administration (F.H.A.) about the availability of priorities for the construction of houses in the area where the partnership was building houses.

He learned in the early part of the summer of 1943 that F.H.A. planned for the building of about 1,000 units of defense housing in the San Fernando Valley where tracts 13170 and 13171 are located, and he intended applying for permits to build more single family houses on tract 13170. However, he was advised at that time that priorities would be granted for multiple unit houses only. He, therefore, made application for authorization to build multiple unit houses.

Effective February 5, 1943, the National Housing Administration (N.H.A.) issued regulations relating to the construction of defense housing which controlled the occupancy and sale thereof. These regulations applied to private war housing begun on or after February 10, 1943, and they were in force, with some revisions and amendments until some time in October, 1945, when they were revoked.

Under the N.H.A. regulations effective February 5, 1943, private war housing had to be held for rental only to eligible war workers for the duration of the national emergency, and, except for involuntary transfers, could be disposed of only in the following manner: An occupant, after 4 months' occupancy, could purchase a private war housing unit occupied by him. A person who would not himself occupy such housing could purchase such housing at any time, in accordance with N.H.A. regulations, provided that the N.H.A. limitations applicable to such housing, relating to occupancy and disposition, before such purchase should continue to be applicable after the purchase. Furthermore, at any time after

60 days after completion of any private war housing, the owner could petition N.H.A. to permit such housing to be disposed of in some way other than the pertinent regulations prescribed.

The partnership's application to F.H.A. to build multiple unit houses in tract 13170 was granted on July 17, 1943, when it was authorized to build 23 four-unit, and 33 two-unit houses, i.e., 56 houses comprising 158 dwelling units, and W.P.B. priorities for materials were issued. Construction was not started until early in October, 1943. Before construction was started, amendments of the N.H.A. regulations applicable to private war housing became effective. Also, before construction of the 56 houses started, the partnership made application to F.H.A. for authorization to construct private war housing on tract 13171.

N.H.A. General Order 60-3B, effective as of August 25, 1943, amended N.H.A. General Order 60-3 by permitting an owner of war housing units to sell to war workers, within 15 days of completion and without first renting the units, one-third of all war housing units placed under construction by the owner in any war housing area. It also permitted the sale of any war housing unit to a war worker occupant after the unit had been rented for two months. There was no change in the provisions of the prior order permitting an owner to sell war housing units, at any time, to a purchaser who would

abide by the N.H.A. regulations relating to the occupancy and disposition of war housing units. The pertinent provisions of N.H.A. General Order 60-3B, which is incorporated herein by this reference, are printed in the margin.[2]

Prior to September, 1943, Edgar Cohn was aware of the new N.H.A. Order 60-3B amending the earlier order. He intended applying for authorization to build houses on tract 13171, and knew that he could apply to N.H.A. to recognize the partnership's construction on the two tracts 13170 and 13171 as one

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[2]Section 3. Disposition of Private War Housing.
.01. For the duration of the national emergency * * * all private war housing begun on or after February 10, 1943, shall be held for rental to eligible war workers as provided in NHA General Order No. 60-2, at the payments specified in the application for priority asistance or authority to begin construction submitted in connection with such dwelling units, * * * and, except for involuntary transfers, shall be disposed of only as follows:
a. (i) a dwelling unit in a private war housing project may be purchased by an occupant (initial occupant or reoccupant) after two months' continuous occupancy by such occupant. (ii) Without conforming to (i) which precludes selling except at the option of the eligible war worker occupant exercised after at least two months' rental occupancy, a dwelling unit in a private war housing project may be held for sale or sold to an eligible war worker, provided that any sale so made shall take place not later than 15 days after the Federal Housing Administration makes its final Priority Compliance Inspection Report ("Completion Report") with respect to the unit (after which time the unit if not sold shall be held for rental as indicated in (i), and

project, and that by treating all the construction as one project he could sell one-third of the houses upon completion, provided they were sold within 15 days. Also, by September, 1943, N.H.A. was authorizing construction of single unit houses.

In September, 1943, before construction of the 56 multiple unit houses, the partnership filed applications with F.H.A. to build 13 four-family houses comprising 52 units, and 109 single unit houses, a total of 161 dwelling units. The applications were approved; priorities were issued on December 17,

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provided, further, that no owner shall sell more than one-third of the units in all projects (begun on or after February 10, 1943) which he has placed under actual construction in any war housing area except such sales as are made in conformity with the requirement of holding for rental as indicated in (i), and provided, further, that any sale made pursuant to (ii) shall be within a price range for the general types of units intended to be sold which is acceptable to the National Housing Agency. * * *

* * *

b. Any such housing may be transferred to a person who will not occupy any part of such housing as his (or her) own dwelling, if

(1) the sale price (except as provided in Section 4 hereof) of each dwelling unit in such housing is not in excess of the fair market price thereof, or $6,000, whichever is lower, and

(2) the transferor submits to the National Housing Agency Regional Representative, * * * an agreement in the prescribed form * * * properly executed by the transferee, stating that such transferee will hold the premises subject to all occupancy and disposition provisions set forth in NHA General Order No. 60-2.

* * *

1943. The partnership, then, was authorized to construct 178 houses comprising 319 units of which one-third, roughly 109, could be sold upon completion.[3] The remaining two-thirds, comprising the 69 multiple unit houses, 210 units, would have to be held for rental to eligible war workers, either by the partnership or its transferee.

In October, 1943, the partnership began construction of the 56 multiple dwelling houses on tract 13170. In March, 1944, the partnership started construction on tract 13171 of the 13 multiple dwelling houses and the 109 single family houses. Construction of all the houses was completed, in 1944, as follows:

Tract 13170	Completion Date
16 multiples completed by	2/14/44
17 multiples completed by	3/ 8/44
10 multiples completed by	3/28/44
13 multiples completed by	4/25/44
56	
Tract 13171	
13 multiples completed by	6/14/44
109 singles completed by	9/ 1/44

[3]The 69 multiple unit houses comprised 210 dwelling units. The total housing authorized comprised 319 dwelling units, of which 109 were the single family houses. It appears that N.H.A. gave its approval of treating 109 units as one-third, and 210 units as two-thirds of the project built on tracts 13170 and 13171.

The partnership sold all of the 109 single family houses to eligible war workers immediately upon completion. The sales were made during the months of July, August, and September, 1944. The partnership advertised the houses for sale. A real estate broker sold the houses, receiving a commission of $60 for each sale. Edgar Cohn assisted the broker in making the sales. The net profit realized from the sales amounted to $111,436. The profit was reported by the partnership in its return for 1944 as ordinary income, on the installment basis.

The 56 multiple dwelling units on tract 13170 were made, which sales began in July, 1944. The before all of the single family houses were completed. The 13 multiple unit houses on tract 13171 were completed by June 14, 1944, which, also, was before the 109 single unit houses were completed, and before the first sales of the single unit houses were made, which sales began in July, 1944. The partnership rented the 210 units in the 69 multiple unit houses, as they were completed. The units were rented under one year written leases which contained a renewal clause. Under O.P.A regulations in existence in 1944, the first and the last month's rent could be collected from a tenant only if a one year lease was given. In 1944, the partnership received gross rentals of $92,437.20 but the net rental amounted to $28,793 after payment of various expenses and finance charges. In the partnership return for 1944, depreciation on the multiple unit houses was taken at the rate of 4 per cent per annum.

Edgar Cohn managed all of the activities of the partnership. Daniel Cohn was in the military service during 1944 and 1945 until his discharge on October 29, 1945.

In the latter part of December, 1944, Edgar Cohn discussed with his advisors, the matter of selling the 69 multiple unit houses. A decision was made to proceed actively to sell them, and in the early part of January, 1945, the partnership listed the multiple unit houses with two separate real estate brokers, Leon Hahn, and Huff & Clair, who were to sell them on a commission basis of $300 for a four-unit house, and $150 for a two-unit house. The first sale was made on January 10, 1945. These two firms sold 8 out of 69 houses during January and early February of 1945. Edgar Cohn considered that the sales were proceeding too slowly, and on February 13, 1945, the partnership made an exclusive, 90-day agreement to sell the remaining 61 houses with another real estate broker named Field. The agreement was renewable for 90 days if one-half of the houses were sold within the first 90 days. Ray McKee, working for Field, devoted most of his time to selling the houses and by October 31, 1945, the 61 multiple houses were sold. Under the exclusive sales agreement with Field, the partnership was to receive a net amount for each house sold, and Field was to receive the regular commission of 5 per cent of the sales price, or anything above the stipulated net amount required by the partnership. The purchaser was to make a down payment. The difference between the down payment and the

F.H.A. mortgage on each house sold was to be carried under a contract with the partnership, providing for monthly payments to the partnership until the amount due under the contract was paid in full. When that point was reached, the F.H.A. would substitute the buyer as the mortgagor, and the buyer would receive the deed held until then in escrow.

The 69 multiple unit houses were sold during a period of 10 months, as follows:

Month	Units Sold	Month	Units Sold
January	4	June	6
February	5	July	2
March	11	August	7
April	12	September	4
May	11	October	7
		Total	69

The four-unit houses were sold at prices ranging from $14,350 to $16,900. The two-unit houses were sold at prices ranging from $8,100 to $8,950. The purchasers of all of the 69 houses took them subject to the N.H.A. regulations as to occupancy and disposition which were still in effect. Existing leases were assigned to the purchasers.

The 69 multiple unit houses were rented, prior to the sales, for a period of 12 to 14 months, on an average. The shortest period any house was rented, before sale, was about nine months; and the longest period any house was rented was about twenty months. During 1945, when vacancies occurred in the multiple-unit buildings, the partnership rented the units on an oral month-to-month basis. No written leases with new tenants were made in 1945.

When the multiple-unit houses were sold, however, some of the original tenants were still occupants. Usually, re-rentals were made without a period of vacancy intervening between tenants. The partnership did not have any difficulty renting units that became vacant during 1945 while the houses were up for sale. During 1945, the partnership received gross rental of $45,841, and net rental income of $8,425.

The partnership realized a net profit of $238,329 from the sales in 1945 of the 69 multiple-unit houses. The profit was reported by the partnership in its returns for 1945 and 1946 on the installment basis as long-term capital gains.

In 1945, Edgar Cohn spent about 65 per cent of his time looking for new locations to build, and about 35 per cent of his time in his office.

Early in the summer of 1945, the partnership applied for and received authorization from F.H.A. and priorities from W.P.B. to construct 14 single-family houses, and two two-unit houses in Pasadena. Construction started in August, 1945, and was completed during the first three months of 1946. The N.H.A. restrictions on occupancy and disposition of war housing units were removed in October, 1945. All of the houses were sold upon completion. The sales were made by real estate brokers on a commission basis. The partnership realized a net profit of $64,835 from the sales, which was reported as ordinary income on an installment basis.

In 1946, the partnership received income of $745 from the rental of some small building or buildings other than the buildings located in the Pasadena project. Also, in 1946, the partnership sold 5 unimproved lots for a gain of $3,618.25, which it reported as ordinary income.

In the 1944 partnership return, aside from income from sales and rental, the only other income items listed are interest income of $3,685.16 and forfeiture income of $25. In the 1945 partnership return, aside from income from sales and rental, the only other income items listed are interest income of $5,882.25 and forfeiture income of $150. In the 1946 partnership return, aside from income from sales, the only other income items listed are interest income of $7,794.36, rent of $745, and miscellaneous income of $53.14.

All of the houses built by the partnership, single and multiple-unit houses, were financed as Title VI, F.H.A., twenty-five-year, 4½ per cent, mortgage loans on individual houses and lots through the Glendale Federal Savings & Loan Association.

From 1946 to December, 1951, Edgar and Daniel Cohn formed additional corporations for the purpose of building houses for sale. Houses built by these corporations, owned by the Cohn brothers, during this period include the following:

Security Construction Company, Inc., was organized in 1941. In 1948 and 1949 it built and sold 365 single houses in Hawthorne, Lawndale and Torrance.

Keswick Corporation was organized in 1946. In 1946, it built in Toluca Lake, near Warner Brothers Studio, 12 four-unit houses which it rented and then sold in 1947, 1948, and 1949.

Orange Gardens was organized in 1947. In 1947 it built 11 apartments in North Long Beach, about 7 miles from ocean. The apartments were rented immediately and are still rented. In 1950 it built and sold 124 single houses in Redondo.

D & E Corporation was organized early in 1946. It acquired land in Hawthorne, near Inglewood. In 1946 and 1947, it built and sold 84 single houses. In 1949 and 1950, it built and sold 59 single houses in Pacific Palisades. In 1950 and 1951, it built and sold 202 single houses in Redondo. In 1951, it was building 80 single houses.

Bonnie Brae Gardens was organized in 1947. In 1947 and 1948, it built 13 multiple-unit houses containing 46 apartment units in the Westlake area, near downtown Los Angeles. The apartments were rented and then sold in 1949 and 1950.

In addition to the above, Edgar and Daniel Cohn had a one-half interest in a partnership known as Construction Enterprises, organized in 1951, which partnership built 72 houses in the San Fernando Valley and sold them upon completion.

From 1941 to December, 1951, Edgar and Daniel Cohn, through their various corporations and partnerships, have built at least 1,332 single and multiple-unit houses. Of the buildings constructed, 1,225 were single-family houses, and all were sold immediately upon completion. At least 107 of the

buildings constructed were multiple houses. The only multiple-unit houses built by petitioners, not sold, but still rented, are the 11 apartment buildings built by the Orange Gardens Corporation in North Long Beach. These 11 apartments are located near the ocean, about 35 miles from the 69 multiple houses sold in 1945, which, here, are in controversy.

At least in January, 1944, Edgar Cohn was advised by the partnership's accountant about the Internal Revenue Code definition of capital assets, that in order to report gain from the sale or exchange of a capital asset as long-term gain, the capital asset must be held more than 6 months, and that property held for sale to customers in the ordinary course of a trade or business is excluded from the Code definition of capital assets. The partnership's accountant pointed out to Edgar Cohn, that even though the partnership rented the multiple-unit houses constructed on tracts 13170 and 13171, if they were sold, a question might arise whether they were held for sale to customers or were capital assets, and the accountant, who took care of taxation matters for the partnership, advised Edgar to send him a letter "stating that they had determined to hold the buildings for investment so that there would be no question about it in the future if sale occurred." Edgar Cohn complied with the accountant's advice by sending him a letter dated January 12, 1944, which is set forth in the margin.[4]

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[4]We are now building fifty-six buildings consisting of thirty-three doubles and twenty-three four-family dwellings in Tract 13170, City of Los Angeles, within three-quarters of a mile from Lockheed Aircraft Corporation.

Ultimate Findings

Prior to and during the taxable years, Security Construction Company—the partnership—was engaged in the business of building houses for sale. It did not, in 1944 or 1945, enlarge or change its business to that of renting residential property for investment, or enter into a new business of renting property to defense workers.

It was originally intended to construct the 69 multiple-unit houses for sale under N.H.A. regulations, as well as the 109 single-unit houses. The 109 single-unit houses and the 69 multiple-unit houses constituted a single defense housing project, and the construction of the 69 multiple-unit houses was necessary in order to sell upon completion, without first renting, the 109 single-unit houses. The renting of the 69 multiple-unit houses was required by N.H.A. regulations and was only incidental to selling them. The 69 houses were held during 1944 and 1945 primarily for sale to customers in the ordinary course of the partnership's business of building and

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During the past three years we have built 200 single-family dwellings, all of which we sold and are now occupied by war workers.

After due and careful consideration, and in view of the fact that we are now engaged in building rental units, we have decided to rent all of the 158 units in the 56 buildings now under construction and hold same for investment purposes.

Respectfully yours,

SECURITY CONSTRUCTION COMPANY,

EDGAR M. COHN,
Co-Partner.

selling houses. They were rented only until it was profitable to sell. The 109 single-unit houses were held primarily for sale to customers in the ordinary course of the partnership's business of building and selling houses.

The 69 multiple-unit houses were not capital assets. The gain realized in 1945 and 1946, on the installment basis, from the sale thereof in 1945 constituted ordinary income rather than long-term capital gain.

OPINION

Harron, Judge:

The narrow question in these proceedings is whether the 69 multiple-unit houses sold in 1945 by Security Construction Company, the partnership, were houses that were held primarily for sale to customers in the ordinary course of the partnership's business, as the Commissioner has determined. If the houses were not so held and were held as "investment" property for more than six months before sale, the gain from the sales can be treated as long-term capital gain. Nelson A. Farry, 13 T.C. 8, 13. The applicable statutory provisions are contained in sections 117 (a) (1) and 117 (j), Internal Revenue Code.

The question to be decided is essentially one of fact. Mauldin v. Commissioner, 195 F. 2d 714, 716; King v. Commissioner, 189 F. 2d 122, 124, certiorari denied 342 U.S. 829; Rubino v. Commissioner, 186 F. 2d 304, certiorari denied 342 U.S. 814. The petitioners contend that the 69 houses in question were

capital assets in that they were primarily held for rent for investment in a distinctly separate and new business of the partnership, namely, a business of renting property for investment. The burden of proof is upon the petitioners to prove that the Commissioner's determination is in error. That is to say, they must prove that the 69 houses in question were not held primarily for sale to customers in the ordinary course of business. Greene v. Commissioner, 141 F. 2d 645, certiorari denied 323 U.S. 717; Commissioner v. Boeing, 106 F. 2d 305, certiorari denied 308 U.S. 619.

In considering all of the evidence, we have recognized that although there are several factors which are helpful in determining whether property is held primarily for sale to customers in the ordinary course of business, or whether it is sold as a capital asset, no single test is determinative. Mauldin v. Commissioner, supra. We have weighed all of the evidence to find out whether the 69 houses were acquired for sale or investment, and whether they were held for sale or investment; to ascertain, truly, whether the partnership ever carried on a business of renting residential property for investment, distinct and apart from its admitted, original business of building and selling houses; to determine, truly, whether the partnership in 1944, made a bona fide change from its original purpose to build the 69 multiple-unit houses for sale to those who would comply with N.H.A. regulations about rental and sale to defense workers to a new purpose to hold them

for rent for investment purposes. We have considered frequency and continuity of sales; the activities of the partners and the agents of the partnership acting in its behalf and under its directions; the extent or substantiality of the transactions. We recognize that the purpose for which the property was held when sold is entitled to considerable weight. Carl Marks & Co., 12 T.C. 1196; Rollingwood Corp. v. Commissioner, 190 F. 2d 263. We recognize, also, that a taxpayer can engage in a dual business, that of selling property and that of renting investment property. Nelson A. Farry, supra, and that if property, originally acquired for investment in a business of renting property for investment is sold as a capital asset, the gain is subject to capital gains treatment. Victory Housing No. 2, Inc., v. Commissioner, ... F. 2d ... (C.A. 10, June 12, 1953), reversing 18 T.C. 466.

The contentions of petitioners have been fully considered, giving attention to the several factors which they emphasize. They rely, for authority in support of their contentions, chiefly upon Nelson A. Farry, supra; and Carl Marks & Co., supra. They cite, also, several unreported memorandum decisions of this Court.

Our conclusion, based upon the findings and ultimate findings is that the 69 multiple houses were held primarily for sale to customers in the ordinary course of the partnership's business of building and selling houses during 1944 and 1945, and, at least during 1945, when they were sold, and that they were not at any time "investment" property—capital assets of a business of renting property for

investment. These conclusions are based upon the entire record. We must reject the petitioners' assertions, as unsubstantial, that the original purpose of building the 69 multiple-unit houses for sale to nonoccupants, and under N.H.A. regulations and restrictions changed in 1944 to a bona fide intention and purpose of renting the houses and holding them for investment. And we have concluded that the petitioners have failed in their burden of proving that the 69 houses were "investment" properties and were not held primarily for sale to customers in the ordinary course of business.

Although the findings set forth the facts in detail, we think the following should be noted here: In the first place, the business of the partnership from its inception was building houses for sale and, until 1944, it never held any rental property. In order to continue its business of building houses, it had to obtain priorities for construction materials, and only for multiple-unit houses were priorities granted, at first. Therefore, the partners applied for priorities to build the 69 multiple-unit houses with the intention of selling them to nonoccupants, subject to government restrictions, as it could do under the N.H.A. regulations, under which either the partnership, the builder, or its transferees should rent the houses to eligible defense workers. Before construction of the first group of multiple-unit houses, 56, was undertaken, F.H.A. enlarged the classification of defense housing to include single-unit houses, and N.H.A. amended its basic order to permit a builder to sell to defense workers upon completion, without first renting to defense

workers, one-third of its houses, provided a sale was made within 15 days after the final inspection. It is perfectly obvious, that the partners calculated that by applying for authorization to build 13 additional multiple-unit houses, they could apply for priorities to build 109 single-unit houses, which could be sold upon completion, because by combining construction on tracts 13170 and 13171 into one project, 319 dwelling units would be constructed. The applications for priorities to build 69 multiple-unit houses were made, therefore, in order to obtain priorities for building the 109 single-unit houses for immediate sale to defense workers without first renting. That, however, did not foreclose the partnership from building, also, the 69 multiple-unit houses for sale. Even though the regulations required that the 69 multiple-unit houses, comprising the remaining two-thirds of the entire number of dwelling units, had to be rented for 2 months, at least, before they could be sold to defense workers, they could, nevertheless, be sold upon completion to nonoccupants subject to the restrictions as to rental and sale to defense workers. Edgar Cohn was aware of this, as his testimony shows. He testified (page 140 of the transcript) that the 69 houses could be rented and they could be sold at any time.

The renting of the units in the 69 multiple-unit houses by the partnership did not preclude its selling any one of the 69 houses.

In fact, Edgar Cohn, in his testimony, indicated clearly that it was desirable to have tenants in the

dwelling units when offering a house for sale to a nonoccupant who could take assignment of leases. It was not inconsistent with an intent to sell the 69 multiple-unit houses that the 109 single-unit houses were sold first, or that the multiple-unit houses were rented prior to the sales thereof. It is also quite conceivable it was desirable to sell the 109 single-unit houses first; they had to be sold, if at all, within 15 days of completion, and it took three months, until September, 1944, to sell the 109 single-unit houses which were completed after the construction of the first 56 multiple-unit houses. At best, the evidence, in our opinion shows merely a dual purpose, namely, to rent the multiple-unit houses until such time as it would be profitable and convenient to sell them. In that situation it must be concluded that "one of the essential purposes (in acquiring or holding the houses) is the purpose of sale," Rollingwood Corp. v. Commissioner, supra, and the profit on sale cannot be treated as capital gain.

The fact that the 69 houses were rented is not inconsistent with a purpose to hold the houses primarily for sale, Rubino v. Commissioner, supra; Niels Schultz, 44 B.T.A. 146; Charles H. Black, Sr., 45 B.T.A. 204; Walter G. Morley, 8 T.C. 904, particularly where, as here, the houses were rented for varying periods of from 9 to 20 months. Cf. Nelson A. Farry, supra, where most of the properties were rented for from one to eleven years. In these proceedings, upon all of the evidence, the rental of the units in the 69 houses cannot be construed as anything more than an incidental activity.

It is observed, also, that the total net profit realized upon the sales of the 69 houses in 1945, based on sales prices was $238,329, more than 6 times the net rentals received in 1944, $28,793. There were, in 1945, the frequency, continuity, and substantiality of sales usually indicative of holding property primarily for sale. Neither the financing of the construction of the 69 houses, nor the manner of selling them differed in any substantial respect from that of financing and selling the 109 single-unit houses. All of the 178 houses constructed in 1944 were sold by real estate brokers engaged by the partnership on a commission basis.

The petitioners argue that these proceedings come within the ambit of the Farry case, the chief authority cited, but the facts of the Farry case are different from the facts here in many important respects as is clear from the following: In the Farry case, the taxable years were 1944 and 1945. Nelson A. Farry had been in the business of managing properties and collecting rents since 1927. Beginning in 1934, he began accumulating rental properties, some of which he bought and some of which he built. At the end of 1941, he owned 45 rental properties comprising about 100 rental units, and in 1943, he acquired 18 more rental properties. Farry, clearly, was in the business of acquiring rental properties, and renting them for investment. In 1944, he sold 19 of his rental properties, and in 1945, he sold 27, a total of 46. Of all of the parcels sold, more than 15 had been rented from 5 to 11

years; 23 had been rented from 1 to 5 years; and 2 had been rented from 6 months to 1 year. Farry decided to liquidate his rental properties because the demand for housing, not investment properties, in Dallas late in 1943, had become extremely large. Rental vacancies had been absorbed and people, in seeking a place to live, were willing to buy houses. Also, rent control was in effect, so that the interest on notes given by purchasers of houses would yield more than the rents from Farry's rental properties. This Court concluded that Farry had proved "by overwhelming evidence that he purchased and held these rental properties primarily for investment purposes," and that the fact that "in the taxable years he received satisfactory offers for some of them and sold them" did not establish that he was holding them primarily for sale to customers in the ordinary course of his trade or business. Farry also constructed houses for sale in two subdivisions which, generally, he sold soon after completion, but such houses were in no way related to or connected with his rental properties and were not in the same location.

In contrast, in these proceedings, we have a business firm which, since its organization, had only built houses for sale. It was obliged to build some multiple unit houses in order to get priorities to continue in the building business. Admittedly, it intended, in the beginning, to sell the multiple unit houses. It began to sell the multiple unit houses six months after the last was completed; and admittedly,

it took into consideration the tax advantages which might result from renting them for six months, at least, before putting them up for sale. We cannot say here that petitioners have proved that the partnership built and held the multiple unit houses primarily for investment puposes. Victory Housing No. 2, Inc., v. Commissioner, supra, is also sharply distinguishable from these proceedings. Victory Housing No. 2, Inc., was organized in October, 1942. Its fiscal year began on July 1, and ended on June 30. The corporation was organized for the purpose of constructing rental houses for defense workers. At some time after March 17, 1943, and during 1944, the corporation constructed 64 single-family houses 32 multiple-unit houses, each containing 4 dwelling units; and 20 single houses, a total of 84 single-unit houses, and 32 multiple-unit houses. All of these houses were rented. During the period from July 1, 1943, to October 1, 1946, 3 years and 3 months, the period involved in the case, none of the 32 multiple-unit houses were sold and the corporation held them for rental and investment purposes. During the period July 1, 1943, to April 10, 1946, 2 years and about 9 months, only 2 out of the 84 single-unit houses were sold, and during the same period the remaining 82 single-unit houses were rented. During 2½ months, from April 10, 1946, to June 30, 1946, 42 single-unit houses were sold; and between July 6, 1946, and October 1, 1946, the remaining 40 single-unit houses were sold. In other words from the time of the completion in 1943 and 1944 of the

116 buildings, until the period April 10, 1946, to June 30, 1946, the 114 buildings were rented, 2 having been sold before April 10, 1946. Houses were rented, before being offered for sale, for, roughly, from 2 to 2½ years. Upon these facts, this Court found that the corporation was engaged in the business of owning and renting residential property during the taxable years. We also found that all of the houses were constructed for rental. The United States Court of Appeals concluded, in reviewing the decision of this Court, that the 42 single-unit houses sold in 1946 constituted capital assets in the corporation's rental business, and that the sales thereof constituted sales of capital assets. The Court of Appeals held, also, that the corporation did not abandon its rental business and that it did not change or enlarge its business so as to become engaged in a new business of buying or developing real estate for sale, and on this point reversed the decision of this Court. The Court of Appeals noted, too, that the corporation, when it sold the 42 single-unit houses did not list them with real estate brokers.

In contrast to the Victory Housing case, we have here the reverse situation. Security Construction Company was organized to build houses for sale and it engaged in the business of building houses for sale. Admittedly, it built all of the controlled housing, single and multiple-unit houses, for sale, and upon the evidence, we cannot find that it went into another business of renting houses for investment purposes. We cannot find that the 69 multiple-unit

houses were the capital assets of a rental business and that, therefore, in 1945, capital assets were sold.

Walter R. Crabtree, et al., 20 T.C.—(No. 120, promulgated July 22, 1953), is distinguishable on its facts.

The respondent's determinations are sustained.

Decisions will be entered for the respondent.

Served Oct 20, 1953.

The Tax Court of the United States, Washington

Docket No. 25600

ALICE E. COHN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court in its Findings of Fact and Opinion promulgated on October 20, 1953, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years ended December 31, 1945, and December 31, 1946, in the amounts of $6,810.12 and $1,835.48, respectively.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered October 26, 1953.

Served October 26, 1953.

The Tax Court of the United States, Washington

Docket No. 25601

MARION A. COHN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court in its Findings of Fact and Opinion promulgated on October 20, 1953, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years ended December 31, 1945, and December 31, 1946, in the amounts of $18,468.73 and $1,967.24, respectively.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered October 26, 1953.

Served October 26, 1953.

The Tax Court of the United States, Washington

Docket No. 25602

DANIEL E. COHN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court in its Findings of Fact and Opinion promulgated on October 20, 1953, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years ended December 31, 1945, and December 31, 1946, in the amounts of $23,018.25 and $1,198.96, respectively.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered October 26, 1953.

Served October 26, 1953.

The Tax Court of the United States, Washington

Docket No. 25603

EDGAR M. COHN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court in its Findings of Fact and Opinion promulgated on October 20, 1953, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years ended December 31, 1945, and December 31, 1946, in the amounts of $8,051.34 and $1,088.21, respectively.

[Seal] /s/ MARION J. HARRON,
Judge.

Entered October 26, 1953.

Served October 26, 1953.

In the United States Court of Appeals for the Ninth Circuit

T.C. Docket No. 25603

EDGAR M. COHN,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

PETITION FOR REVIEW

Edgar M. Cohn, the appellant in this case (petitioner below) by Edward L. Conroy, his attorney, hereby files this petition for review by the United States Court of Appeals for the Ninth Circuit of a decision of the Tax Court of the United States entered on October 26, 1953, (T.C. Docket No. 25603) determining deficiencies in the appellant's federal income taxes for the calendar years 1945 and 1946 in the respective amounts of $8,051.34 and $1,088.21, and respectfully shows:

I.

Jurisdiction

Appellant at the time of the filing of this petition is a citizen of the United States and resides in the County of Los Angeles, State of California.

The returns of income tax in respect of which the aforementioned tax liability arose were filed by appellant with the Director (Collector) of Internal Revenue in the City of Los Angeles, State of California, which is located within the Jurisdiction of

the Court of Appeals for the Ninth Circuit. The appellant, Edgar M. Cohn, petitions for review pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code (26 U.S.C.A. 1141 and 1142).

II.

Nature of Controversy

The controversy involves the proper determination of petitioner's liability for federal income taxes for the calendar years 1945 and 1946. The income of this appellant upon which the deficiency is based is his distributable share of income during the years 1945 and 1946 from gains on sales of multiple residence buildings owned by Security Construction Company, a copartnership of which appellant was a copartner.

In 1943 and 1944 the partnership constructed sixty-nine multiple-family apartment buildings in Los Angeles and all of them were rented on one year written leases which leases provided for an automatic renewal of one year at the expiration of the current term. Said buildings were rented for an average period of approximately fourteen months. The properties were held exclusively for rental and not for sale until December, 1944. A majority of the apartments were occupied by employees of Lockheed Aircraft Company, an aircraft manufacturing Company engaged in manufacturing war planes. In December, 1944, the partnership determined to liquidate its investment and sell said buildings.

In reporting the sales of said apartment buildings they were treated as capital assets, all having been held for investment purposes for more than six months, and were subject to depreciation under the provisions of Section 23 of the Internal Revenue Code. The deficiency asserted by the appellee for the year 1946 is on deferred profits realized in that year on sales made in 1945. The tax court determined that the gains from the sales of said multiple buildings constituted ordinary income and were not subject to treatment as capital gains and the deficiency is based upon that determination.

III.

The appellant, Edgar M. Cohn, being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Court, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ EDWARD L. CONROY,
Counsel for Appellant.

Duly verified.

Received and filed December 28, 1953.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Daniel A. Taylor, Chief Counsel,
Bureau of Internal Revenue,
Washington, D. C.

You are hereby notified that the appellant, Edgar M. Cohn, on the 28th day of December, 1953, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision fo the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated at Los Angeles, California, this 5th day of January, 1954.

Respectfully,

/s/ EDWARD L. CONROY,
Counsel for Appellant.

Service of copy acknowledged.
[Endorsed]: Filed January 18, 1954.

[Title of Tax Court and Cause.]

Docket No. 25600, Docket No. 25601, Docket No. 25602 and 25603

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties hereto, by their respective attor-

neys, that the following facts are true and correct, without prejudice to the right of either party to offer evidence not inconsistent or contrary to the facts herein set out, to wit:

1. The partnership, Security Construction Company, was formed on May 21, 1942, and the partners have at all times been Edgar M. Cohn and Daniel E. Cohn. Marion A. Cohn is and was during the entire years 1945 and 1946 the wife of Edgar M. Cohn. Daniel E. Cohn and Alice E. Cohn were married June 5, 1945, and have at all times since been husband and wife. Edgar M. Cohn and Daniel E. Cohn are brothers.

2. Tract No. 13172 in the City of Los Angeles, California, was acquired by the partnership by deed dated May 25, 1942, as acreage, and was subdivided by the partnership on August 26, 1942, into 132 lots. In the latter part of 1942 and the early part of 1943 the partnership built 130 single-family residences in said tract. Twenty-one of said residences were sold in 1942 and 109 were sold in 1943. The profits on said sales were reported for Federal Income Tax purposes as ordinary income and taxes were paid on that basis.

3. Tract No. 13170 in the City of Los Angeles, California, containing 56 lots, numbered 1 to 56, inclusive, was subdivided on September 27, 1943, and the partnership acquired said subdivided tract by deed dated September 28, 1943.

4. Tract No. 13171 in the City of Los Angeles, California, containing 122 lots, numbered 1 to 122,

inclusive, was subdivided on January 19, 1944, and the partnership acquired said subdivided tract by deed dated January 21, 1944.

5. The partnership constructed 56 multiple-family apartment buildings in Tract 13170, one on each of the 56 lots. Twenty-three of these were four-unit apartment buildings and 33 were two-unit apartment buildings. The buildings constructed on Tract 13170 were completed as follows:

Lot Nos.	Date Completed
24-39 inc.	2/14/44
40-56 inc.	3/ 8/44
14-23 inc.	3/28/44
1-13 inc.	4/25/44

6. In about March, 1944, the partnership commenced the construction of 13 four-unit apartment buildings and 109 single-family residences on Tract 13171. The 13 apartment buildings were completed by June 14, 1944, and the single-family residences by September 1, 1944.

7. The 109 single-family residences in Tract 13171 were sold from July to September, 1944, and the profits on said sales were reported for Federal Tax purposes as ordinary income and taxes were paid on that basis.

8. Depreciation was claimed on the said apartment buildings in the Federal Income Tax Returns filed by the partnership for the years 1944 and 1945 at the rate of 4% per annum.

9. The 69 apartment buildings referred to in paragraphs 5 and 6 above were sold during the calendar year 1945, between January 16 and October 31, inclusive. These 69 apartment buildings

were located on Lots 1 to 56, inclusive, in Tract 13170, and Lots 110 to 122, inclusive, in Tract 13171. These sales were reported by the partnership in its 1945 partnership income tax return on the installment basis, as long-term capital gains. The Commissioner has determined the profits from such sales taxable as ordinary income.

10. The partnership built two duplexes and 14 single-family residences in Pasadena. Construction of said buildings was started in about July, 1945, and the buildings were completed during the first three months of 1946 and were sold in February and March, 1946. The profits on said sales were reported for Federal Income Tax purposes as ordinary income and taxes were paid on that basis.

/s/ EDWARD L. CONROY,
Counsel for Petitioners.

/s/ CHARLES OLIPHANT, BHN,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

Filed at hearing December 5, 1951.

The Tax Court of the United States

Dockets Nos. 25600, 25601, 25602, and 25603

SUPPLEMENTARY STIPULATION OF FACTS

It is hereby stipulated and agreed by the parties hereto that Exhibit "A," attached hereto, correctly states the net rental income of the partnership, Security Construction Company, for the calendar year 1944, and Exhibit "B" attached hereto, correctly states the net rental income of said partnership for the calendar year 1945.

Dated: December 10, 1951.

/s/ EDWARD L. CONROY,
Counsel for Petitioners.

/s/ MASON B. LEMING,
Acting Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

EXHIBIT A

Security Construction Company

Allocation of Expense Deductions Between Rental Operations and All Other Operations

			Per Return	Rental	
Gross Rental Income Per Partnership Return for 1944					$92,437.20
Salaries and Wages			$ 12,360.90		
D. Cull		$ 1,702.00		-0-	
Beth Wagner (Cain)		2,858.90		$ 2,858.90	
Max M. Cohn		7,800.00		1,000.00	
			44,954.90		
Interest					
@ 8 mos. 1 to 13 incl.	$156,000.00—5%	5,200.00			
@ 9 mos. 14 to 23 incl.	114,600.00—5%	4,297.50			
@ 11 mos. 24 to 39 incl.	105,300.00—5%	4,826.24			
@ 10 mos. 40 to 56 incl.	116,800.00—5%	4,866.67			
@ 6½ mos. 110 to 122 incl.	156,000.00—5%	4,225.00			
	$648,700.00	$23,415.41		23,415.41	
Taxes					
Soc. Sec. Taxes			468.68	150.00	
Real estate taxes on Tr 13171-13170			7,614.89	5,614.89	

EXHIBIT A—(Continued)

	Per Return	Rental	
Depreciation			
Rental buildings	16,271.30	16,271.30	
Office buildings	179.85	60.00	
Repair and maintenance	8,488.50	8,488.50	
Insurance	5,313.28		
(On 13170 and 13171) (39 mos.)			
Rental units 620/1079—57½% x $5,313.28		3,055.14	
Sales units (109) 459/1079			
Commissions	1,100.00	-0-	
Legal and accounting	1,335.01	667.50	
Telegrams and telephone	916.79	316.79	
Miscellaneous	1,219.17	609.59	
Office expense	1,173.43	473.43	
Auto expense	1,559.16	359.16	
Advertising	902.75	302.75	
Total deductions per return	$103,858.61		
Allocated expenses to rental			$63,643.36
Net rental income after allocation of expenses to rental			$28,793.84

Filed at hearing December 10, 1951

Security Construction Company

EXHIBIT B

Security Construction Company

Allocation of Expense Deductions Between Rental Operations and All Other Operations

			Per Return	Rental
Gross Rental Income Per Partnership Return for 1945				$45,841.07
Salaries and Wages:				
Beth Cain 53 wks. @ $65.00 (Office)			$ 3,445.00	$ 1,722.50
Interest			18,506.29	13,746.88
@ ½ mo. #16-17	24,000.00—5%	$ 50.00		
@ 1 mo. #42-49	13,000.00	54.17		
@ 1½ mo. #10-11	24,000.00	150.00		
@ 2 mo. #24-37-39-51-52-55	39,400.00	328.33		
@ 3 mo. #1-2-12-13-14-15-25-28-38-43-54-56	116,800.00	1,460.00		
@ 3½ mo. #3-26-35-36-41-44-45-46	58,100.00	847.30		
@ 4½ mo. #18-19-29-30-40-47	50,300.00	943.33		
@ 5 mo. #21-22-31-33-34-48-50-53-110-115-116	99,300.00	2,068.75		
@ 6½ mo. #120	12,000.00	330.00		
@ 7 mo. #32	6,600.00	192.50		
@ 7½ mo. #4-5-121-122	48,000.00	1,500.00		

Interest—(Continued)					
@ 8 mo. #20-111-112	36,000.00	1,200.00			
@ 8½ mo. #6-7-113-114	48,000.00	1,700.00			
@ 9½ mo. #8-9-23-27-117-119	61,200.00	2,422.50			
@ 10 mo. #118	12,000.00	500.00			
	$648,700.00	$13,746.88			
Taxes			204.71	102.36	
Real est. 72.13: Soc. Sec. 132.58					
Depreciation			9,845.34	9,815.00	
Advertising			34.66	17.33	
Auto Expense			911.14	455.57	
Insurance			1,202.45	1,150.00	
Office Supplies & Expense			1,109.98	609.98	
Legal & Accounting			1,471.14	735.57	
Repr. & Mtnce. Rental Ppty.			8,128.52	8,128.52	
Tel. & Tel.			576.00	288.00	
Miscellaneous			1,288.07	644.04	
Commissions			13.25	—	
Misc. Title Expense			122.29	—	
Total Deductions Per Return			$46,858.84		
Allocated Expenses to Rental					$37,415.75
Net Rental Income After Allocation of Expenses to Rental					$ 8,425.32

The Tax Court of the United States

Dockets Nos. 25600, 25601, 25602 and 25603

ALICE E. COHN, et al.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF PROCEEDINGS

December 5, 1951—1:30 P.M.

(Met pursuant to notice.)

Before: Honorable Marion J. Harron,
Judge.

Appearances:

EDWARD L. CONROY,
Appearing for the Petitioners.

DONALD P. CHEHOCK,
(Honorable Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), Appearing for the Respondent.

PROCEEDINGS

The Clerk: Dockets Nos. 25600, 25601, 25602 and 25603. Alice E. Cohn and associated cases.

Please state your appearances, gentlemen.

Mr. Conroy: Edward L. Conroy, 501 Taft Building, 1680 North Vine Street, Hollywood, California.

Mr. Chehock: Donald P. Chehock, for the Respondent.

The Court: Mr. Conroy, your opening statement, please.

Mr. Conroy: Yes.

OPENING STATEMENT ON BEHALF OF THE PETITIONERS

Mr. Conroy: If the Court please, Mr. Chehock and I have entered into a written stipulation which Mr. Chehock will file. Many of the facts have been stipulated, which should shorten the trial.

The deficiencies involved are for the years 1945 and 1946. The Petitioners, as stated in the stipulation, are as follows: The Petitioner Daniel E. Cohn is married to Alice E. Cohn, and the Petitioner Edgar M. Cohn is married to the Petitioner Marion A. Cohn.

The Petitioners Daniel E. and Edgar M. Cohn in 1942 entered into a copartnership agreement for the purpose of constructing single-family dwellings for sale in the County of Los Angeles. They pursued that business until 1943, [2*] when they were advised by the War Housing Board and by the Government officials that priorities would not be available to them. That was in February, the early part of February, 1943, that they were advised that priorities would not be available to them for the building of singe-family houses, but that priorities would be available, in a certain number, for the building of multiple-dwelling houses. They acquired certain property for the construction of multiple dwellings in Tract 13170 in the City of Los Angeles, California, and pursuant to the priorities obtained, constructed 56 multiple-dwelling houses.

They built the 56 multiple dwellings and before they were constructed, or the construction was completed, the facts will show or the law establishes the fact that there was a change in the Regulations, Government regulations, with reference to building houses. When they got the priorities they were required to rent the houses for four months. In about September, 1943, and before these houses

*Page numbering appearing at top of page of original Certified Transcript of Record.

were completed—it may have been August—the Regulations were changed in that the required rental was only two months. The houses, the stipulation will show, were finished starting about in February, 1944, to some time in about April, of 1944. If my facts are wrong on that, it is in the stipulation and the stipulation will control.

Prior to the time they were completed, we will show [3] that Mr. Edgar Cohn discussed the matter of holding them for rent for investment purposes with Mr. Hollingsworth, who is the vice president of the Glendale Federal Savings & Loan Association. He was advised it was a good investment and it was his advice that it be held for investment purposes to build up an estate.

He then contacted Mr. J. E. Biby, Esquire, who will not be called as a witness, who has practiced from his home for a number of years, and is more or less retired.

The Court: How do you spell his name?

Mr. Conroy: B-i-b-y. He used to be quite a prominent lawyer here in Los Angeles.

Mr. Edgar Cohn consulted with Mr. Biby in reference to holding these properties for rent for investment purposes. Mr. Edgar Cohn, for the partnership, and Mr. Daniel Cohn, who was then in the Service, came to the decision, based on the advice and their own investigation, to hold these properties indefinitely for rental.

They went to see the accountant, Mr. H. K. Wood, who is a certified public accountant, and has been for many years in Los Angeles, and told him of

their decision. That was the first part of January, 1944. They were advised by Mr. Wood on that occasion that if they were going to hold them for rental purposes, that they should write him a letter so stating. [4]

Mr. Edgar Cohn, on behalf of the partnership, the Security Construction Company, wrote such a letter stating they were no longer holding these for sale, but for rental. They entered into one-year leases on all of the properties. The leases were the standard form of lease called the Wolcott form in California, or at least in Southern California. A sample of the lease will be introduced into evidence, and it provided that at the expiration of the term the lease was automatically renewed for one extra year, unless 60 days prior to the expiration of the lease either the landlord or the tenant gives notice to the other for the right to terminate at the end of the year. I believe the evidence will show that no such notice was given, that the properties were occupied for an average length of time of approximately 20 months. I may have to correct that statement.

I believe the evidence will show that in about December, 1944, the latter part of December, 1944, which is about a year after the parties had determined to hold the properties for investment, these properties being situated about three-quarters of a mile from Lockheed and being occupied chiefly by Lockheed employees and there being considerable publicity of the imminent termination of the war,

and therefore the question of whether or not these assets would be endangered by retaining them in their present form as apartment buildings, the partnership determined to [5] dispose of the assets, to preserve them from possible loss through the wholesale evacuation.

I believe the evidence will show that their opinion was erroneous and their anticipated fears were not warranted in that instead of their being that condition after the war, the unexpected occurred and there became a great housing shortage when the boys came home, by which they could have made considerable more money had they retained the properties for a longer period of time.

If the Court please, I think that we can shorten this and that this case will be a little more easily understood if I could at this time, in support of my statements, introduce into evidence certain tract maps, location maps, copies of which have been submitted to Mr. Chehock. I understand he has no objection to my introduction of those things into evidence, and he has certain evidence he wants to introduce in his own opening statement.

Mr. Chehock: I wonder if it might be more in order to let me make an opening statement, first.

The Court: Please do not offer any exhibits yet. Is there anything further?

Mr. Conroy: That is all that occurs to me at this time. There are probably a lot of other things that are important and material that we will adduce evidence concerning, but that is enough for a brief outline of the facts. [6]

The Court: We have had a good many of these cases in the Tax Court involving the same issue.

Mr. Conroy: I realize that.

The Court: The Rollingwood case; you are probably acquainted with that.

Mr. Conroy: Yes.

The Court: About how many witnesses are you going to call?

Mr. Conroy: Mr. Edgar Cohn—Mr. Daniel Cohn was overseas in Service most of the time, and he can't testify from first-hand knowledge. I intend to call for a few minutes testimony one other witness, and then I intend to call Mr. Hollingsworth of the Glendale Federal Savings & Loan Association and Mr. H. K. Wood, the certified public accountant. That is about all the testimony. The testimony that will take the longest time is that of Mr. Edgar Cohn, and I can't anticipate Mr. Chehock's cross-examination.

The Court: Mr. Chehock.

OPENING STATEMENT ON BEHALF OF THE RESPONDENT

By Mr. Chehock:

It might be in order, first, your Honor, to move the consolidation of these cases. The same issue is involved in all the cases, and I think it is agreeable with counsel.

The Court: Motion for consolidation is [7] granted.

Mr. Chehock: As counsel has stated, the taxable years are the years 1945 and 1946. All the sales

that are in controversy here, all took place in the year 1945. The year 1946 is affected, however, since the sales were reported on the installment basis, and, of course, the subsequent years likewise will be affected by this decision.

The amount of income tax deficiency for the two years here involved is some $62,439.33. The question in issue here, your Honor, as I think you could well understand by counsel's statement, is simply whether or not the profits from the sales constituted ordinary income under Section 22a of the Code, or, on the other hand, the sale of capital assets coming within the provisions of Section 117J of the Code.

The Court: Excuse me a minute, please. What is the amount of profit involved under the issue?

Mr. Chehock: I was just going to state that. The amount of gross rental in 1945 was $45,741.07. The amount of net profit from sales in the year 1945 was $238,329.85, a ratio of about 5 to 1. The rental income that I started to use is gross rental.

The Court: So the question for 1945 is whether all or one-half of $238,329.85 is taxable?

Mr. Chehock: That is not quite a correct statement for the reason that $238,329.85 is the entire eventual net profit. However, they reported it on the installment basis, [8] and all of that profit was not realized in the year 1945. The returns will show the exact amount.

The Court: All right. Go ahead.

Mr. Chehock: Some of the facts, as counsel has stated, have been stipulated; a number of facts have

not. However, with the very generous cooperation on the part of the other side—and I might say to your Honor that I have never had a case which evidenced better cooperation—I think we can work this out so that other exhibits can be put into evidence with a little oral testimony, which will be almost as short as stipulating, and perhaps more effective, more understandable to the Court.

While there are many facts here, details which I don't think it would be necessary to mention here, the more essential or major points, at least in the eyes of the Respondent in this case, are somewhat as follows:

This partnership started in 1942. From the year 1942 to 1946, this partnership, made up of the two brothers, Daniel and Edgar Cohn, have been in the business of buying unimproved property and subdividing it or buying newly-developed improved property, constructing the buildings and selling the houses.

In the year 1942, 21 houses were built and sold, for which the partnership realized a net profit of $15,035.21. All of that was not realized in 1942, but that was the [9] eventual profit from the sales.

In the year 1943, 109 houses were built by them and sold, for which the eventual net profit was $73,349.92.

In the year 1944, 109 houses were built and sold, for which the eventual net profit was $111,436.50.

In the year 1945, which is one of the years here in controversy, 69 multiple houses, which are the houses in controversy, were sold, which had been

built in the fall of 1943 and in the year 1944, for which eventual net profits were realized of over $238,000.00.

In the year 1946, two duplexes and 14 houses were sold, which were built in the fall of '45 and in the first part of '46, along with some vacant lots, for which the partnership realized a net profit of $68,045.26.

The income tax returns or the working papers of the accountant will be introduced into evidence, which will verify that these figures are correct.

From September, 1942, to October 31, 1945, a little over three years, the partnership built altogether 324 houses, all of which, by November of 1945, had been sold. None were retained. All of the 324 houses that were built were sold immediately after construction, except the 69 multiple houses here in controversy. All of the profits from the sales, except the 69, have been reported as ordinary income and taxes paid accordingly. On all returns, the occupation stated in [10] the partnership returns is that of the individuals being in the real estate business.

This case, your Honor, which I think you have already understood, is a War Housing project case, and it is much the same type of case as the one you just mentioned, the Rollingwood Corporation case, the recent Arthur Winnick case, the Louis Rubino case, and others, which I am sure your Honor is well acquainted with, and which will be covered in briefs. It is the Respondent's position that the Government's case is at least as strong, if not stronger, than those cases I have just mentioned.

As for the 69 houses here in controversy, held

primarily for sale for customers in the ordinary course of business, intended by Section 117, even though they were rented for a part of 1944 and 1945, it is believed the evidence will show that all 69 were rented in the first place because of the National Housing Agency requirements. It is believed the evidence will further show that written leases were entered into for the period of a year, because the OPA required it in order to collect the first and last month's rent in advance. I believe the evidence will show that the last of the 69 apartment houses here in controversy was completed on June 14, 1944; the 69 having been completed from February to June 14th, and within less than seven months after June 14th—some over six and a little less [11] than seven—all of the 69 were up for sale and the partnership reported them as having held them over six months as long-term capital gains.

The Respondent further takes the view here, whether the 69 apartment houses were held in 1944 for investment only, which fact, of course, Respondent does not concede, and which we do not think the evidence will show, but whether it is held for that purpose or, on the other hand, held for the dual purpose to rent or to sell, depending on future events, as brought out by the Circuit Court in the Rollingwood Corporation case; irrespective of that, throughout the entire year 1945 they were held primarily for sale to customers in the ordinary course of business. Consequently, the profits are taxable under Section 22a as ordinary income.

The Respondent cannot agree that the method followed by the Petitioners in the sale of those 69 apartment houses is fundamentally different than the sale of the other houses; or that the method used takes it out of the language of the statute as having been sold in the ordinary course of business within the taxable year 1945.

That, your Honor, I believe is a statement of the case and of our view. If it is all right with your Honor and with counsel, I will now offer the stipulation of facts. I think, as counsel stated, he can offer a great many other exhibits at this time, which will shorten the trial and [12] enlighten the Court so you will know what the case is about.

The Court: We will proceed in that way. The stipulation of facts is received and made a part of the record.

Mr. Conroy: May I make one short statement?

The Court: Are there any exhibits attached to the stipulation?

Mr. Chehock: No. Do you want to make a statement before I introduce these documents?

Mr. Conroy: I understood you to say——

The Court: Mr. Chehock and Mr. Conroy, I think we may understand now that the court has an order of procedure and without your assistance, the Court will work out the order of procedure. Thank you for your help. I will take care of all of that.

Have you anything else you wish to state at this time?

Mr. Chehock: Nothing except to offer some exhibits.

The Court: I believe that the proper procedure is for the Petitioner to offer his exhibits first, and the Court will give Mr. Conroy an opportunity to do so without your assistance, Mr. Chehock, and you may be seated.

Mr. Conroy, you may proceed.

Mr. Conroy: If I understood Mr. Chehock correctly, he made the statement that my clients built around 320 houses. There were 253 single houses and then there were the multiple [3] buildings on top of that. I failed to state to your Honor one salient fact in that case, and that is that we intend to show that the income, the net income, from the operation of those apartments was about $41,000.00 a year, a very substantial amount. It does not appear in the returns because it was not reported for a full year, either in 1945 or 1946.

The Court: But you will adduce evidence on that point?

Mr. Conroy: Yes.

The Court: Now, will you offer your exhibits first, please.

Mr. Conroy: If the Court please, I offer into evidence the subdivision map, a conformed copy of the map that was filed in the Office of the County Recorder in Los Angeles County. This is Tract No. 13172, being the first subdivision of the partnership.

The Court: Any objection?

Mr. Chehock: No objection.

The Court: There being no objection, it will be received in evidence as Exhibit 1.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 1.)

The Court: I want to ask you a question about that. In the first place, I understand that you do not intend to have any testimony explaining those maps; is that right? [14]

Mr. Conroy: No, I don't think so. It is just for the enlightenment of the Court.

The Court: You want the Court to be able to visualize the layout, and I want then to ask you —I believe Mr. Chehock will have no objection to your answering a few questions, even if you are not a witness, since there seems to be no question of fact about where the property was located, and all of that.

You have three maps. I guess you had better offer all three, and then I will ask a few questions.

Mr. Conroy: There are four maps. One of the tracts was so long that we had to have two maps. The two maps can be received as one exhibit for Tract No. 13170, as Exhibit 2 for the two maps.

The Court: Received in evidence as Petitioner's Exhibit 2.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 2.)

Mr. Conroy: I might state that that subdivision was the one upon which 56 multiple buildings were constructed by the partnership. There were 33 two-family and 23 four-family buildings constructed on that tract.

The Court: 33 two-family and 23 four-family. That is not covered by the stipulation?

Mr. Chehock: Yes, it is. [15]

The Court: What is Exhibit 3?

Mr. Conroy: Subdivision of Tract No. 13171, which was contiguous to the other two subdivisions.

The Court: Received in evidence as Petitioner's Exhibit 3.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 3.)

Mr. Conroy: I might state for the Court's enlightenment that there were 13 four-family buildings and 109 single-family residences built in that tract.

The Court: In general, where are these three tracts located?

Mr. Conroy: For that purpose may I introduce another exhibit which Mr. Chehock has agreed to, and which will show the Court where they are located?

The Court: That map is received in evidence as Petitioner's Exhibit 4.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 4.)

Mr. Conroy: You are familiar with the Burbank part of Los Angeles. Lockheed Aircraft is shown with the red lines, horizontally. The tract shown in the left-hand corner, the green portion, is the multi-

ple buildings. The red portion is the section of the single-family residences, and the Lockheed Aircraft Corporation, which is on San Fernando Road, is [16] shown toward the right lower portion of the map. The Southern Pacific Railroad through the San Joaquin Valley is shown above or north of Lockheed Aircraft. The Southern Pacific Coastline is shown south of Lockheed Aircraft. And I believe that designates the location.

The Court: In general, these tracts are located over in Burbank?

Mr. Conroy: Within the city limits of the City of Los Angeles, adjacent to Burbank. Lockheed is in Burbank.

If the Court please, may I proceed?

The Court: You have put on the blackboard in the courtroom one of your maps. Isn't that right?

Mr. Conroy: It is a map of all three tracts.

The Court: Do you want the Clerk to move the blackboard?

Mr. Conroy: If we could put it where the Court could see it.

The Court: I suggest you put it opposite the little gate.

Mr. Conroy: We had that map drafted by engineers. The map is too long. It strings out over too long a site to be able to get an official map photographed. But we can agree I think, that that is substantially correct. The red portion represents the single-family residences. The green portion represents the apartment buildings. [17]

I will ask that it be introduced in evidence as Petitioner's Exhibit next in order.

The Court: Without taking the map down, Mr. Baird, will you please stamp that map as Exhibit 5? It is received in evidence, of course.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 5.)

Mr. Conroy: If the Court please, we have an aerial photograph of the property as it has been built, which was taken some time after it was built. I have submitted a copy of that to Mr. Chehock, and I would like to introduce a photograph of the tract into evidence.

The Court: Without objection, that is received in evidence as Petitioner's Exhibit 6.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 6.)

Mr. Chehock: I have no objection to any of these, your Honor.

Mr. Conroy: If the Court please, we have the priorities under which the 56 buildings were constructed, which was on Tract 13170. This refers to the first multiple buildings. These priorities were granted by the Federal Housing Administration, and I would like to introduce that into evidence.

I have furnished a photostatic copy of that [18] to counsel.

Mr. Chehock: No objection.

The Court: Received in evidence as Petitioner's Exhibit 7.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 7.)

The Court: Is there a date on that?

Mr. Conroy: Yes.

Mr. Chehock: There will probably be some testimony on that.

Mr. Conroy: Yes; there is a number on the application. It is 99-122-000281. In the right-hand corner it gives the date issued as July 17, 1943. By way of explanation, because when you look at this document it is confusing, I understand that when the Federal Housing Administration issued priorities they were only for a limited time, something like three months. Then when that time passed and if you weren't completed building, you would surrender the one you had and they would issue a new one.

While it appears to be issued July 17, 1943, down in the lower left-hand corner it indicates that the Federal Housing Administration issued this particular priority on February 22, 1944. With that explanation, it can be understood that the original priority, which is similar to that, was surrendered and this was picked up to take its place. [19]

The next exhibit I would like to introduce is Priority No. 99-122-000932. It appears the day issued was December 17, 1943, and that the priority refers to the 109 single-family houses and the 13 multiple houses or buildings.

The Court: Received in evidence as Petitioner's Exhibit 8.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 8.)

Mr. Conroy: If I may step up to Exhibit No. 5, I would like to point this out to the Court: Tract No. 13170 extends from the point where I am pointing, which is Lot 39, up to the point where I am pointing, which is Lot 1. Now, the 56 houses were located on that part of it. The 13 houses were located on the Lot No. 110 to Lot 122, inclusive, on Tract 13171. While the green indicates all multiple properties, the 13 houses were in a different tract. That is on the top part of that exhibit.

If the Court please, in our written stipulation we have stipulated the date of the conveyances from the previous owner of the property to the Security Construction Company, but Mr. Chehock would like to have the deeds in evidence. I have no objection to that because there may be some argument.

The Court: How many deeds are there?

Mr. Conroy: There are four deeds that refer to the [20] tracts.

The Court: Can you refer to the dates on the deeds?

Mr. Conroy: Yes.

The Court: There are four deeds which are to be numbered Exhibits 9, 10, 11 and 12.

Mr. Conroy: The first one is the deed dated the 25th day of May, 1942.

The Court: That is received in evidence as Petitioner's Exhibit 9.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 9.)

The Court: The next one?

Mr. Conroy: The next one is dated the 25th day of May, 1942.

Mr. Chehock: That is the same date. There are two dated the same date.

The Court: Received in evidence as Petitioner's Exhibit No. 10.

Mr. Conroy: They both refer to the same tract which is 13172.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 10.)

Mr. Conroy: The third deed is 56 lots in Tract No. 13170, and is dated September 28, 1943.

The Court: Received in evidence as [21] Petitioner's Exhibit 11.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 11.)

Mr. Conroy: The fourth deed covers Lots 1 to 122, inclusive, of Tract No. 13171, dated January 21, 1944.

The Court: Received in evidence as Exhibit 12.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 12.)

Mr. Conroy: May I ask Mr. Chehock, do you want evidence on the Glendale schedule or are you satisfied on that?

Mr. Chehock: No, I am satisfied, so let that go in.

Mr. Conroy: I now offer in evidence a record of the Glendale Federal Savings & Loan Association, a corporation who financed the construction of the properties on Tracts 13170 and 13171, showing the loan number, the original amount of the loan, the insured amount of the loan, additional loans, total amount borrowed, date of note and trust deed, the date of record of each trust deed and the additional amount.

It is a schedule three pages in length.

Mr. Chehock: These loans are on this particular exhibit covering the loans on the 69 multiple houses built on Tracts 13170 and 13171; is that right? [22]

Mr. Conroy: That is correct.

The Court: Received in evidence as Petitioner's Exhibit 13.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 13.)

PETITIONERS' EXHIBIT No. 13

List of 56 Loans to Security Construction Company
a Co-Partnership

Tract #13170

Loan No.	Orig. Amt. of Loan	Insured Amt. of Loan	Add'l Loan 4/24/44	Total Amt. Borrowed	Date of Note & T.D.	Date of Recording T.D.
FHA-3063	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3064	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3065	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3066	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3067	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3068	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3069	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3070	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3071	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3072	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3073	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3074	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3075	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3076	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3077	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3078	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3079	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3080	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3081	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3082	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44

Loan No.	Orig. Amt. of Loan	Insured Amt. of Loan	Add'l Loan 4/24/44	Total Amt. Borrowed	Date of Note & T.D.	Date of Recording T.D.
FHA-3083	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3084	$11,800.00	$12,000.00	$200.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3085	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3086	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3087	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3088	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3089	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3090	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3091	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3092	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3093	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3094	$ 6,300.00	$ 6,600.00	$300.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3095	$ 6,300.00	$ 6,600.00	$300.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3096	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3097	$ 6,400.00	$ 6,700.00	$300.00	$ 6,700.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3098	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3099	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3100	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3101	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3102	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3103	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3104	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3105	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3106	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44

Loan No.	Orig. Amt. of Loan	Insured Amt. of Loan	Add'l Loan 4/24/44	Total Amt. Borrowed	Date of Note & T.D.	Date of Recording T.D.
FHA-3107	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3108	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3109	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3110	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3111	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3112	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3113	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3114	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3115	$ 6,300.00	$ 6,500.00	$200.00	$ 6,500.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3116	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3117	$ 6,400.00	$ 6,600.00	$200.00	$ 6,600.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44
FHA-3118	$11,700.00	$12,000.00	$300.00	$12,000.00	9/18/43	TD-9/30/43 ADDL-5/ 2/44

List of 13 Loans to Security Construction Company
a Co-Partnership

Tract #13171

Loan No.	Orig. Amt. of Loan	Insured Amt. of Loan	Add'l Loan	Total Amt. Borrowed	Date of Note & T.D.	Date of Recording T.D.
FHA-3512	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3513	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3514	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3515	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3516	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3517	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3518	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3519	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3520	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3521	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3522	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3523	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44
FHA-3524	$12,000.00	$12,000.00		$12,000.00	1/20/44	1/26/44

Admitted in evidence December 5, 1951.

The Court: Exhibit 13 is a long schedule. You say it sets forth the loans that were made, the loan number, and so forth. You must mean the loan on each house that was built.

Mr. Conroy: That is right. They were financed separately.

The Court: Were they builders' loans?

Mr. Conroy: They were long-time financing, 25-year amortized loans.

The Court: You say you are not going to offer any other evidence about that matter, but are you going to offer evidence to show how you financed these houses? I don't know who gave the note, whether a note of the partnership was given or whether these are notes of buyers.

Mr. Conroy: That was the note of the partnership in each instance given for the purpose of financing the construction of the houses and were permanent loans on the houses, 25-year loans.

Mr. Chehock: As I understand it, all loans on the individual houses, as well as the multiple houses, were FHA [23] loans for 25 years, under Title VI; is that right?

Mr. Conroy: That is right.

The Court: Please proceed.

Mr. Conroy: If the Court please, the evidence will show that the multiple buildings were all sold by one broker whose name was Eddy D. Field, with the exception of the income buildings——

The Court: What do you mean by "the income buildings"?

Mr. Conroy: That would be the apartment buildings shown in green on the map, 69 buildings.

I have here a schedule showing the sales of the eight buildings that were not sold by Eddy D. Field, showing the selling price, the commission paid, the date of sale, and in some instances, the escrow number.

If Mr. Chehock is willing that that may go in, I will offer it.

Mr. Chehock: I think it should.

The Court: I will receive that in evidence as Petitioner's Exhibit 14.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 14.)

PETITIONERS' EXHIBIT No. 14

List of 8 Income Buildings Not Sold Under Contract With Eddy D. Field

Admitted in evidence December 5, 1951.

Lot No.	Tract	Broker	Date-Sold	Selling Price	Commission
16	13170	Leon Hahn	1/10/45	$16,900.00	$300.00
17	13170	Leon Hahn	1/10/45	16,900.00	300.00
42	13170	Leon Hahn	1/19/45 (Escrow #476 Glendale Fed.)	8,500.00	150.00
18	13170	R. T. Huff	5/18/45	16,400.00	300.00
19	13170	R. T. Huff	5/18/45	16,400.00	300.00
49	13170	Leon Hahn	1/30/45 (Escrow #482 Glendale Fed.)	8,500.00	150.00
10	13170	Huff & Clair	2/10/45	16,900.00	300.00
11	13170	Huff & Clair	2/10/45 (Escrow #486 Glendale Fed.)	16,900.00	300.00

The Court: I expect we will come back to some of this evidence later?

Mr. Conroy: But this will shorten the introduction of oral testimony considerably. [24]

I also have a schedule here, a copy of which has been furnished to Mr. Chehock, showing the buildings that were purchased by Eddy D. Field and Roy McKee, who is the sales agent of Eddy D. Field. They purchased a number of buildings. I have the lot numbers, their names, the date of purchase and the purchase price above each of those.

Mr. Chehock: No objection.

Mr. Conroy: I would like to introduce that.

The Court: Received in evidence as Petitioner's Exhibit 15.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 15.)

PETITIONERS' EXHIBIT No. 15

Buildings Purchased By Eddy D. Field and Roy McKee from Security Construction Company In Tracts 13170 and 13171

Lot No.	Buyer	Date of Contract	Sales Price
24	Roy McKee	2/27/45	$ 8,100.00
55	Eddy Field	2/27/45	8,100.00
25	Roy McKee	4/ 1/45	8,100.00
54	Eddy Field	4/ 5/45	8,100.00
53	Eddy Field	5/11/45	8,100.00
116	Roy McKee	6/ 1/45	14,750.00
118	Eddy Field	6/ 1/45	14,475.00
115	Roy McKee	6/ 1/45	14,750.00
22	Roy McKee	6/ 1/45	14,750.00
110	Eddy Field	6/ 1/45	14,500.00
111	Roy McKee	8/14/45	14,350.00
112	Roy McKee	8/14/45	14,350.00
113	Roy McKee	9/15/45	14,450.00
114	Roy McKee	9/15/45	14,450.00

Admitted in evidence December 5, 1951.

Mr. Conroy: We have made up a list of all of the apartments that were occupied and rented under one-year leases. They were all rented under one-year leases. And we have made up a list of those apartments in which the tenant, the original tenant moved from the premises, his lease canceled before the property was sold by the Petitioner, and it sets forth the date of the new lease, with the new tenant; and also sets forth the dates that rents were lost or gained by reason of the change of tenants.

I believe Mr. Chehock had this examined by Mr. Willkie, an Internal Revenue agent.

Mr. Chehock: That is right. It represents many hours of investigation, and it is correct. [25]

Mr. Conroy: I would like to introduce that.

Mr. Chehock: I think that is true, that where the lease on the particular lot is not shown, there is the implication that that lease was carried on from the beginning until the property was sold.

Mr. Conroy: That is right. As I stated, on this list there are no properties where the tenant originally signed a lease and stayed in all the time they owned the property. This is only where they had new leases.

The Court: Received in evidence as Petitioner's Exhibit No. 16.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 16.)

PETITIONERS' EXHIBIT No. 16

List of Apartments Upon Which One Year Leases Were Cancelled and Apartments Re-Rented

(After January 1945 There Were No Written Leases, but Renting Was By Verbal Agreement.)

Tract 13170 Lot	Street Address	Lease Commenced	Date Cancelled	Rent Paid To	Date of Commencement New Lease	Rent Days Lost	Rent Days Gained
1	8050 D.G.	5/15/44	10/20/44	11/ 1/44	11/ 1/44	—	—
1	8048 D.G.	5/ 1/44	10/20/44	11/ 1/44	11/ 1/44	—	—
2	8046 D.G.	5/ 1/44	10/20/44	11/ 1/44	11/ 1/44	—	—
2	8040 D.G.	5/ 1/44	6/21/44	6/23/44	7/ 1/44	7	
3	8038 D.G.	5/ 1/44	6/ 1/44	6/ 1/44	6/ 1/44	—	—
3	8034 D.G.	5/15/44	7/31/44	7/20/44	9/ 1/44	36	
3	8034 D.G.	9/ 1/44	3/ 1/45	3/ 1/45	3/ 1/45	—	—
3	8032 D.G.	5/15/44	9/ 5/44	9/15/45	9/ 1/44		14
4	8028 D.G.	5/ 1/44	5/31/45	6/ 1/45	6/ 1/45	—	—
4	8024 D.G.	5/ 1/44	6/10/44	6/10/44	6/ 1/44		9
4	8024 D.G.	6/ 1/44	1/12/45	1/12/45	1/15/45	3	
4	8024 D.G.	1/15/45	6/15/45	6/15/45	7/15/45	30	
5	8022 D.G.	5/15/44	3/ 2/45	3/ 2/45	3/ 1/45		1
5	8022 D.G.	3/ 1/45	7/15/45	7/15/45	7/15/45	—	—
5	8016 D.G.	5/ 1/44	6/24/44	7/ 1/44	7/ 1/44	—	—
6	8012 D.G.	5/ 1/44	1/ 1/45	1/ 1/45	3/15/45	74	
6	8010 D.G.	5/ 1/44	11/ 3/44	11/15/44	11/15/44	—	—
6	8010 D.G.	11/15/44	6/ 1/45	6/15/45	6/ 1/45		14
6	8008 D.G.	5/ 1/44	9/12/44	10/ 1/44	10/ 1/44	—	—
7	8004 D.G.	5/ 1/44	7/15/44	7/15/44	8/ 1/44	14	
7	8002 D.G.	5/ 1/44	6/26/44	7/ 1/44	7/ 1/44	—	—
7	8000 D.G.	4/15/44	1/20/45	1/20/45	2/ 1/45	10	
8	7996 D.G.	5/ 1/44	3/ 1/45	3/ 1/45	3/ 1/45	—	—
8	7996 D.G.	3/ 1/45	9/ 1/45	9/ 1/45	9/ 1/45	—	—
8	7994 D.G.	4/15/44	5/19/44	5/19/44	5/15/44		4
8	7994 D.G.	5/15/44	7/ 8/44	7/11/44	7/15/44	—	—
9	7988½ D.G.	4/15/44	7/15/44	7/19/44	8/15/44	26	
9	7988 D.G.	4/15/44	10/30/44	11/ 5/44	11/ 1/44		4
10	7984 D.G.	4/15/44	9/15/44	9/15/44	9/15/44	—	—
10	7982½ D.G.	4/15/44	7/15/44	7/15/44	7/15/44	—	—
10	7982½ D.G.	7/15/44	9/18/44	9/26/44	10/ 1/44	4	
13	7978 D.G.	4/15/44	1/10/45	1/15/45	1/15/45	—	—
13	7966 D.G.	4/15/44	11/ 7/44	1/10/45	1/15/45	5	
13	7964 D.G.	4/15/44	3/24/45	3/24/45	3/15/45		9
14	7960 D.G.	4/ 1/44	6/24/44	7/ 1/44	7/ 1/44	—	—
14	7960 D.G.	7/ 1/44	10/ 4/44	10/20/44	11/ 1/44	10	
14	7958½ D.G.	4/15/44	6/14/44	6/25/44	6/15/44		10
14	7958½ D.G.	6/15/44	9/16/44	9/20/44	9/15/44		5
15	7952½ D.G.	4/ 1/44	2/ 1/45	2/ 1/45	2/ 1/45	—	—
15	7952 D.G.	4/ 1/44	10/10/44	10/23/44	10/15/44		8

Tract 13170 Lot	Street Address	Lease Commenced	Date Cancelled	Rent Paid To	Date of Commencement New Lease	Rent Days Lost	Rent Days Gained
15	7952 D.G.	10/15/44	3/ 5/45	3/ 5/45	3/ 1/45		4
16	7950 D.G.	4/ 1/44	9/25/44	9/25/44	10/ 1/44	5	
17	7940½ D.G.	4/ 1/44	6/ 1/44	6/21/44	6/15/44		6
17	7940 D.G.	4/ 1/44	7/22/44	8/ 1/44	8/ 1/44	—	—
18	7936 D.G.	4/ 1/44	9/14/44	9/15/44	9/15/44	—	—
18	7936 D.G.	9/15/44	4/11/45	4/11/45	5/ 1/45	19	
18	7934 D.G.	4/ 1/44	8/25/44	9/ 1/44	9/ 1/44	—	—
18	7932 D.G.	3/15/44	5/ 1/44	5/ 1/44	5/ 1/44	—	—
19	7930 D.G.	4/ 1/44	3/ 1/45	3/ 1/45	3/ 1/45	—	—
19	7924 D.G.	4/ 1/44	11/ 3/44	11/20/44	11/15/44		5
20	7920 D.G.	4/ 1/44	7/11/44	7/18/44	7/15/44		3
21	7914 D.G.	3/15/44	4/17/44	4/18/44	Vacant When Sold	38	
21	7910 D.G.	3/15/44	5/15/44	6/15/44	7/ 1/44	15	
23	10157 Arminta	3/15/44	9/13/44	9/21/44	9/15/44		6
24	7890 Claybeck	2/15/44	6/ 1/44	6/ 1/44	6/ 1/44	—	—
25	7884 Claybeck	2/15/44	9/21/44	10/ 1/44	10/ 1/44	—	—
26	7878 Claybeck	2/15/44	11/30/44	12/20/44	12/15/44		5
27	7874 Claybeck	2/15/44	7/24/44	8/ 1/44	8/ 1/44	—	—
28	7868 Claybeck	2/15/44	10/27/44	11/ 1/44	10/15/44		15
28	7866 Claybeck	2/15/44	10/10/44	10/16/44	10/15/44		1
28	7866 Claybeck	10/15/44	3/20/45	3/20/45	Vacant When Sold	16	
29	7860 Claybeck	2/15/44	2/15/45	2/15/45	2/ 1/45		14
30	7856 Claybeck	2/ 1/44	9/ 1/44	10/ 1/44	9/ 1/44		30
30	7856 Claybeck	9/ 1/44	2/14/45	2/15/45	2/15/45	—	—
31	7850 Claybeck	2/ 1/44	8/ 5/44	8/15/44	8/15/44	—	—
31	7848 Claybeck	2/ 1/44	1/ 2/45	1/ 1/45	1/ 1/45	—	—
32	7844 Claybeck	2/ 1/44	5/ 1/44	5/ 1/44	5/ 1/44	—	—
33	7838 Claybeck	2/ 1/44	7/31/44	8/ 1/44	8/ 1/44	—	—
33	7836 Claybeck	2/ 1/44	5/22/44	5/22/44	5/15/44		7
34	7832 Claybeck	2/ 1/44	9/26/44	10/ 1/44	10/ 1/44	—	—
34	7832 Claybeck	10/ 1/44	10/14/44	11/ 1/44	10/15/44		14
36	7820 Claybeck	2/ 1/44	10/20/44	10/24/44	10/15/44		9
37	7812 Claybeck	2/ 1/44	3/ 1/45	3/ 1/45	Vacant When Sold	8	
38	7808 Claybeck	2/ 1/44	4/ 1/44	4/ 1/44	4/ 1/44	—	—
38	7808 Claybeck	4/ 1/44	10/30/44	11/14/44	11/15/44	1	
38	7808 Claybeck	11/15/44	1/15/45	1/15/45	1/15/45	—	—
38	7806 Claybeck	2/ 1/44	5/ 1/44	5/ 1/44	5/ 1/44	—	—
38	7806 Claybeck	5/ 1/44	2/ 1/45	2/ 1/45	2/ 1/45	—	—
39	7800 Claybeck	2/ 1/44	7/25/44	8/ 1/44	8/ 1/44	—	—
40	7801 Claybeck	3/ 1/44	5/29/44	6/ 1/44	6/ 1/44	—	—
40	7801 Claybeck	6/ 1/44	8/30/44	9/ 1/44	9/ 1/44	—	—
45	7835 Claybeck	3/ 1/44	6/16/44	7/ 1/44	6/15/44		15
47	7845 Claybeck	3/ 1/44	5/27/44	5/27/44	6/ 1/44	4	
48	7851 Claybeck	3/ 1/44	7/30/44	9/ 1/44	9/ 1/44	—	—
48	7853 Claybeck	3/ 1/44	5/ 9/44	5/ 9/44	5/15/44	6	
49	7859 Claybeck	3/ 1/44	7/13/44	7/15/44	7/15/44	—	—
49	7857 Claybeck	3/ 1/44	6/16/44	6/17/44	6/15/44		2

Tract 13170 Lot	Street Address	Lease Commenced	Date Cancelled	Rent Paid To	Date of Commencement New Lease	Rent Days Lost	Rent Days Gained
50	7865 Claybeck	3/ 1/44	9/21/44	9/26/44	10/ 1/44	5	
50	7865 Claybeck	10/ 1/44	1/29/45	2/ 1/45	2/15/45	14	
51	7869 Claybeck	2/15/44	6/ 3/44	6/ 3/44	6/ 1/44		2
51	7869 Claybeck	6/ 1/44	10/ 3/44	10/15/44	10/15/44	—	—
51	7871 Claybeck	3/ 1/44	5/ 1/44	5/ 1/44	5/ 1/44	—	—
53	7879 Claybeck	2/15/44	5/15/44	5/24/44	5/15/44		9
55	7891 Claybeck	2/15/44	5/15/44	5/16/44	5/15/44		1
56	7866 Arcola	2/15/44	3/23/44	4/ 1/44	4/ 1/44	—	—
56	7866 Arcola	4/ 1/44	6/ 5/44	6/ 6/44	6/ 1/44		5
56	7866 Arcola	6/ 1/44	2/ 1/45	2/10/45	2/ 1/45		9
56	7868 Arcola	2/15/44	5/10/44	5/15/44	5/15/44	—	—
56	7868 Arcola	5/15/44	2/15/45	2/15/45	Vacant When Sold	41	
110	8100 D.G.	5/15/44	12/15/44	12/15/44	12/15/44	—	—
110	8106 D.G.	6/ 1/44	2/10/45	2/10/45	2/15/45	5	
110	8106 D.G.	2/ 1/45	4/ 1/45	4/ 1/45	Vacant When Sold	70	
111	8110 D.G.	5/15/44	1/ 3/45	1/ 3/45	1/ 1/45		2
111	8110 D.G.	1/ 1/45	6/ 1/45	6/ 1/45	6/ 1/45	—	—
111	8114 D.G.	5/15/44	6/ 6/45	6/ 6/45	6/ 1/45		5
112	8116 D.G.	5/15/44	6/ 7/45	6/ 7/45	6/ 1/45		6
112	8118 D.G.	6/ 1/44	7/ 3/45	7/ 3/45	7/ 1/45		2
112	8120 D.G.	6/ 1/44	7/19/45	7/19/45	7/15/45		4
113	8124 D.G.	6/ 1/44	6/26/44	7/ 1/44	7/ 1/44	—	—
113	8124 D.G.	7/ 1/44	2/ 1/45	2/ 1/45	2/ 1/45	—	
113	8124 D.G.	2/ 1/45	6/ 1/45	6/ 1/45	6/ 1/45	—	—
113	8128 D.G.	6/ 1/44	8/ 9/44	8/ 9/44	8/ 1/44		8
113	8128 D.G.	8/ 1/44	5/ 5/45	5/ 5/45	5/ 1/45		4
113	8128 D.G.	5/ 1/45	9/10/45	9/10/45	9/10/45	—	—
113	8130 D.G.	5/15/44	7/ 3/45	7/ 3/45	7/ 1/45		2
114	8132 D.G.	6/ 1/44	9/15/44	9/20/44	9/15/44		5
114	8136 D.G.	6/ 1/44	11/16/44	11/18/44	11/15/44		3
115	8140 D.G.	6/ 1/44	2/15/45	2/15/45	2/15/45	—	—
115	8142 D.G.	6/ 1/44	8/30/44	9/ 1/44	9/ 1/44	—	—
115	8142 D.G.	9/ 1/44	11/30/44	12/ 1/44	12/ 1/44	—	—
115	8146 D.G.	5/15/44	12/ 5/44	12/15/44	12/15/44	—	—
116	8148 D.G.	6/ 1/44	5/ 1/45	5/ 1/45	Vacant When Sold	33	
116	8152 D.G.	5/15/44	5/18/45	5/18/45	Vacant When Sold	16	
118	8164 D.G.	6/ 1/44	8/30/44	9/ 1/44	9/ 1/44	—	—
119	8172 D.G.	6/15/44	6/15/45	6/15/45	6/15/45	—	—
120	8182 D.G.	6/15/44	2/10/45	2/10/45	2/ 1/45		9
121	8202 D.G.	6/15/44	9/13/44	9/20/44	9/15/44		5
121	8202 D.G.	9/15/44	3/ 1/45	3/ 1/45	3/ 1/45	—	—
121	8204 D.G.	7/ 1/44	10/12/44	10/15/44	10/15/44	—	—
121	8204 D.G.	9/15/44	3/15/45	3/15/45	3/15/45	—	—
122	8208 D.G.	6/15/44	1/ 8/45	1/15/45	1/15/45	—	—
122	8208 D.G.	1/15/45	3/15/45	3/15/45	3/15/45	—	—

Admitted in evidence December 5, 1951.

Mr. Conroy: I can't recall of anything else I have to offer at this time by way of written documents.

The Court: Now, Mr. Chehock, have you some exhibits you would like to introduce at this time?

Mr. Chehock: I would like to offer in evidence as Exhibit A, the copy of the work papers of the taxpayer's 1942 partnership return. The 1942, 1943 and 1944 returns filed with the Government, your Honor, have been destroyed and we have to use the best thing we have. The best thing we have is the copy of the work papers of the accountant who made up the returns.

Mr. Conroy: No objection. [26]

The Court: Received in evidence as Respondent's Exhibit A.

(The document above referred to was received in evidence and marked Respondent's Exhibit A.)

Mr. Chehock: I would like to call the Court's attention to the fact that the business or profession is real estate and that the net profits from sales in that year totaled $15,035.21. That is the eventual net profit from sales.

I would like to offer as Exhibit B the work paper copy of the taxpayer's 1943 partnership return, and at the same time call the Court's attention to the fact that the eventual net profits from sales for that year were $73,349.92.

The Court: Received in evidence as Respondent's Exhibit B.

(The document above referred to was re-

ceived in evidence and marked Respondent's Exhibit B.)

Mr. Chehock: I would like to offer in evidence as Exhibit C the work paper copy of the taxpayer's 1944 partnership return. When I say "taxpayer," I am referring in Exhibits A, B and C, the partnership returns.

I would like to offer this 1944 return into evidence and call the Court's attention to the fact that the eventual net profits from sales for that year were $111,436.50.

The Court: Received in evidence as [27] Exhibit C.

(The document above referred to was received in evidence and marked Respondent's Exhibit C.)

Mr. Chehock: I would like to offer into evidence as Exhibit D the original partnership 1945 return filed with the Government, and call the Court's attention to the fact that the eventual net profits from sales were $238,329.85, plus a profit of $681.31 from the sale of a repossession.

The Court: Received in evidence as Respondent's Exhibit D.

(The document above referred to was received in evidence and marked Respondent's Exhibit D.)

Mr. Chehock: As Exhibit E, the original partnership 1946 return, filed with the Government, and I call the Court's attention to the fact that the profits from sales that year, the eventual net profits, were $68,453.26.

The Court: Received in evidence as Respondent's Exhibit E.

(The document above referred to was received in evidence and marked Respondent's Exhibit E.)

Mr. Chehock: I would like to call the Court's attention to all of these returns, that the word "real estate," is the occupation.

As Exhibit F, the 1945 individual return of Daniel E. Cohn, and call the Court's attention that on this and all other returns to be offered, the word, "real estate," appears as the [28] occupation.

The Court: Received in evidence as Respondent's Exhibit F.

(The document above referred to was received in evidence and marked Respondent's Exhibit F.)

Mr. Chehock: As Exhibit G the 1945 original individual return of Alice E. Cohn.

The Court: Received in evidence as Respondent's Exhibit G.

(The document above referred to was received in evidence and marked Respondent's Exhibit G.)

Mr. Chehock: I offer in evidence as Exhibit H the individual 1945 return of Edgar M. Cohn.

The Court: Received in evidence as Respondent's Exhibit H.

(The document above referred to was received in evidence and marked Respondent's Exhibit H.)

Mr. Chehock: I offer in evidence as Exhibit I the 1945 original return of Marion A. Cohn.

The Court: Received in evidence as Respondent's Exhibit I.

(The document above referred to was received in evidence and marked Respondent's Exhibit I.)

Mr. Chehock: I offer in evidence as Exhibit J the 1946 individual return of Daniel E. Cohn. [29]

The Court: Received in evidence as Respondent's Exhibit J.

(The document above referred to was received in evidence and marked Respondent's Exhibit J.)

Mr. Chehock: I offer in evidence as Exhibit K the individual 1946 return of Alice E. Cohn.

The Court: Received in evidence as Exhibit K.

(The document above referred to was received in evidence and marked Respondent's Exhibit K.)

Mr. Chehock: I offer in evidence as Exhibit L the 1946 return of Edgar M. Cohn.

The Court: Received in evidence as Respondent's Exhibit L.

(The document above referred to was received in evidence and marked Respondent's Exhibit L.)

Mr. Chehock: As Exhibit M, the 1946 return of Marion A. Cohn.

The Court: Received in evidence as Respondent's Exhibit M.

(The document above referred to was received in evidence and marked Respondent's Exhibit M.)

Mr. Chehock: To help the Court, I believe the Court has the right of taking judicial notice in the Federal Register, but to aid the Court in finding it, we would like to present at this time what is designated as General Order [30] No. 60-1 of the National Housing Agency. This is a photostatic copy.

The Court: Any objection?

Mr. Chehock: Both counsel agree that the Court can take judicial notice of all——

The Court: On that point may I say that I prefer having the matter handled this way. It is not prejudicial to the other party and it saves a great deal of time for the Court in locating these matters in the Federal Register. Also if I have the order on my desk, I don't have to get a book out of my library.

Does that present any problem to you?

Mr. Conroy: I don't think it does. I would like to offer the Judge the original rather than the copy. I will get the original, if the Court please.

Mr. Chehock: Is it agreeable with counsel that in the event there may be some amendments or modifications of regulations of the National Hous-

ing Agency or any other Federal agency, it is all right to take judicial notice of what they are, if we don't present them all?

Mr. Conroy: That is naturally agreeable.

The Court: It might be considered error for the Court to take judicial notice of some of the others.

Mr. Chehock: We are giving you permission, if that is required, to take all into account if there are some that [31] we don't present.

Mr. Conroy: Do you have the order that was made in August and September? Did you get that from the Federal Housing Administration?

Mr. Chehock: Yes, I have that one.

Mr. Conroy: That is not similar to the one I furnished you.

Mr. Chehock: No.

Mr. Conroy: That is General Order 60-3b.

Mr. Chehock: I offer into evidence a photostatic copy of the National Housing Agency's General Order 60-1.

The Court: Without objection, that is received in evidence as Exhibit N.

(The document above referred to was received in evidence and marked Respondent's Exhibit N.)

RESPONDENT'S EXHIBIT N

NHA Memorandum

Approved 12/4/42

Effective 12/4/42

/s/ COLMAN WOODBURY,
Asst. Admr. (Program) D.

Operating Manual
National Housing Agency
Office of the Administrator

Original Filed in Office of Director,
Administrative Relations Division

Subject: Procedures for Application of General Order No. 60-1. (Applies to all employees of the National Housing Agency and to all persons engaged in the management of public or private housing reserved for war workers.)

Procedures for the implementation of the attached General Order No. 60-1 are being developed as rapidly as possible. Until such procedures are released, officers of the National Housing Agency will be expected to apply the order to the occupancy of war housing under their jurisdiction to the best of their ability.

NHA General Order No. 60-1

Approved 11/27/42

Effective 11/27/42

/s/ JOHN B. BLANDFORD, JR.,
Administrator.

Operating Manual
National Housing Agency
Office of the Administrator

Original Filed in Office of Director,
Administrative Relations Division

Subject: Public Regulation — Eligibility for Occupancy of War Housing (Private and Public.) (Applies to all employees of the National Housing Agency and to all persons engaged in the management of public or private housing reserved for war workers.)

Section 1—General Policy

.01 The National Housing Agency is responsible for the proper occupancy of war housing under its control and for the adoption of regulations assuring the reservation of war housing for indispensable in-migrant civilian war workers.

.02 The statement of policy issued jointly by the War Production Board and the National Housing Agency on April 15, 1942, established that the National Housing Agency would provide housing only

for war workers whose in-migration from beyond the distance of feasible transportation into localities of intensive war production activity is indispensable to augment the local labor supply to the extent necessary for securing maximum practicable war production. By the Directive of July 16, 1942, the War Department, the Navy Department and the National Housing Agency have agreed further that the NHA shall program housing only for indispensable in-migrant civilian war workers, and that with respect to housing already programmed preference shall be given to such workers.*

.03 For the purpose of carrying out the general policy indicated above, the following definitions are necessary to determine "indispensable in-migrant civilian war workers." The application of these definitions shall be subject to such regulations respecting preferences as may hereafter be adopted.

Section 2—Definition of Civilian War Worker

.01 Civilian war workers, in addition to qualifying as "indispensable in-migrants" according to sections 3 and 4 below, are those falling within one of the following classifications:

1. Civilian workers employed in plants, establish-

*In the District of Columbia, however, in-migrant enlisted men and officers of the Army and Navy shall be eligible except that, in projects under the Lanham Act, P.A. No. 671 and P.A. No. 781, officers above the rank of Captain in the Army and Lieutenant Senior Grade in the Navy shall not be eligible.

ments, or other units which are included on a Locality List (prepared for each defense housing critical area by the NHA Regional Representative with the advice of a designated representative of the War Manpower Commission), because they are engaged primarily in the following essential war activities:

(a) Production, mining or fabrication of materials or products used exclusively or almost exclusively by the armed forces and the merchant marine (not including articles used also by civilians such as clothing, shoes, food, soap, etc.), and production, mining or fabrication of materials or products going into or used for the production or fabrication of such materials or products;

(b) Transportation where it is vitally necessary to the transport of war materials or products, war workers, or the armed forces;

(c) Power production where it is vitally necessary for (a), (b), or (d);

(d) Production or repair of equipment, machinery, and tools needed for the foregoing activities;

Construction workers shall not be eligible for war housing unless they are engaged in construction needed for the foregoing activities and (except for existing structures and trailers), unless the prospect is that they will be stationed in the locality for

the duration of the emergency as "civilian war workers."

2. Civilian employees of the United States in the following categories:

(a) Persons working in (though not necessarily employed by) plants, establishments, or units included on the Locality List specified under 1 above;

(b) Employees of the Navy or War Department assigned to duty at naval or military reservations, posts or bases which also are included on the Locality List specified under 1 above;

(c) Employees of Federal agencies in classes 1, 2, 3, and 4, of the "Priority Classification of Executive Departments and Agencies" issued by the Bureau of the Budget on September 25, 1942, who are administratively determined hereby to be engaged in work essential to national defense. (Employees in this category are not eligible for occupancy as civilian war workers in projects developed under Title I of the Lanham Act or P.A. No. 781.)

3. Civilian workers (including employees of the United States) engaged in services performed within a defense housing critical area and necessary to the health and safety of "civilian war workers" in that area: Provided, that the NHA Regional Representative and a designated representative of the War Manpower Commission deem in-migration into the area indispensable to furnishing such serv-

ices and on that basis includes such services on the Locality List specified under 1 above. These services may include water, sewage, and public utility services; medical, dental, and public health services; fire, and police protection; educational services; and in exceptional circumstances food distribution and essential neighborhood service trades.

Section 3—Definition of In-Migrant Civilian War Worker

.01 In-migrant civilian war workers, in addition to qualifying as "civilian war workers" and as "indispensable" according to sections 2 and 4, must fall within one of the following classifications:

1. A civilian war worker whose present or most recent residence is beyond practicable daily commuting distance from his place of work;

2. A civilian war worker who is a family head whose family is housed separately from him at a home beyond practicable daily commuting distance from his place of employment and who finds it necessary to bring his family to live with him;

3. A civilian war worker who, within one year prior to the date of execution of a contract of purchase or a lease of public or private war housing, has come into the locality from a former home beyond practicable daily commuting distance, and who now has to live under temporary or makeshift conditions so intolerable as to impair his efficiency.

.02 A civilian war worker who cannot find other

suitable living conditions when forced to move from his dwelling because it is to be demolished or converted to other use or the possession thereof recovered by the lessor in a manner permitted by the regulations issued by the Administrator of the OPA, shall be considered in the same category as an in-migrant.

.03 "Practicable daily commuting distance" shall mean a distance within which it is possible to commute daily to the place of employment by established common carrier or by private transportation available to the worker with a cost to the war worker of not more than 50c per round trip and with normal traveling time of not more than three hours per round trip.

Section 4—Definition of Indispensable In-Migrant Civilian War Worker

.01 The term indispensable in-migrant civilian war worker shall include only those "in-migrant civilian war workers," qualified according to sections 2 and 3 above, whose in-migration into an area is absolutely necessary to the war effort. The War Manpower Commission shall furnish lists for the various areas, indicating whether or not for various occupations there are such shortages of labor as to justify in-migration. The War Manpower Commission will not regard a shortage of labor justifying in-migration to exist unless every reasonable effort has been made to meet labor requirements by use of local labor and by other practicable alternatives. No war

housing shall be reserved for any civilian war worker who in-migrates to an area subsequent to a determination by the War Manpower Commission that no such shortage of labor exists in the area with respect to the occupation to which he belongs.

Section 5—Field Interpretation

.01 NHA Regional personnel shall consult and advise with a designated representative of the War Manpower Commission in interpreting these definitions in borderline cases arising out of special local conditions. Through such consultation most borderline cases can be handled in the field. Interpretations which would amount to amendment shall be referred to the Office of the Administrator.

Admitted in evidence December 5, 1951.

Mr. Chehock: As Exhibit O, Respondent offers National Housing Agency's General Order No. 60-2.

The Court: Received in evidence as Respondent's Exhibit O.

(The document above referred to was received in evidence and marked Respondent's Exhibit O.)

RESPONDENT'S EXHIBIT O

NHA General Order No. 60-2
(Appears in Federal Register as Title 24, Chapter VII.)

Approved 2/2/43

Effective 2/5/43

JOHN B. BLANDFORD, JR.,
Administrator.

Operating Manual
National Housing Agency
Office of the Administrator

Original Filed in Office of Director,
Administrative Relations Division

Subject: Public Regulations—Occupancy and Disposition of Private War Housing. (Applies to all employees and representatives of the National Housing Agency and to all persons engaged in the management of Private Housing Reserved for War Workers.)

Section 1—General Policy

.01 The National Housing Agency is responsible for the proper occupancy of housing programmed for war workers and for the adoption of regulations assuring that war housing will be held available for eligible war workers for the duration of the national emergency declared by the President on

September 8, 1939. The purpose of this General Order is to set forth the private housing to which occupancy standards apply, the persons who are eligible war workers for such housing, the length of time such housing must be held for their use, the conditions under which such housing may be transferred or sold, and the conditions under which occupancy standards applicable to such housing may be modified or removed.

Section 2—Private War Housing to Which Occupancy Standards Apply

.01 Private war housing to which occupancy standards apply are the following:

a. All new housing, and the additional housing accommodations created by remodeling or rehabilitation, which received or receives priority assistance or authority to begin construction as follows:

1. Application for priority assistance was submitted prior to February 10, 1943, on Form PD-105 and received or receives priority assistance through Preference Rating Order No. P-55, or

2. Application for priority assistance or authority to begin construction is submitted on or about February 10, 1943, on Form PD-105 (Revised 2-10-43), if Section B thereof is executed;

b. All new housing, and the additional housing accommodations created by remodeling or rehabili-

tation, which received or receives either priority assistance or authority to begin construction, as a result of submitting an application for such assistance or authority on Form PD-200, if such application was accompanied by the form Applicant's Supplemental Certification and if such housing was not to be occupied by the owner;

c. The additional housing accommodations created by remodeling or rehabilitation financed under Class 1(b) of Title I of the National Housing Act.

d. Housing financed under Class 3 of Title I of the National Housing Act for which an application was or is submitted to the local office of the Federal Housing Administration:

1. Prior to February 10, 1943, and such application was accompanied by, or supplemented with, a War Housing Statement Form, or

2. On or about February 10, 1943, and the applicant also executes Section B of Form PD-105 (Revised 2-10-43), in connection with such housing;

e. Housing financed with a mortgage loan insured by the Federal Housing Administration under Section 603 of Title VI of the National Housing Act for which an application was submitted to the local office of the Federal Housing Administration:

1. Prior to February 10, 1943, and such application was accompanied by, or supplemented with, FHA Form 2004 (e), or

2. On or after February 10, 1943;

f. Housing financed with a mortgage loan insured by the Federal Housing Administration under Section 608 of Title VI of the National Housing Act; and

g. The additional housing accommodations created by remodeling or rehabilitation in projects designated as "defense housing," by either the Division of Defense Housing Coordination or the National Housing Agency, in order to exempt such housing from Federal Reserve Board Regulation W.

.02 For the purposes of this General Order, private war housing is "begun" on the date of submitting to the Federal Housing Administration a properly executed application for priority assistance or authority to begin construction in connection with such housing; or, if remodeling or rehabilitation of any private war housing did not receive priority assistance or authority to begin construction, such housing was "begun" either on the date a properly executed application was filed under Title I, Class 1(b), of the National Housing Act in connection with such housing, or on the date a properly executed application for exemption from Federal Reserve Board Regulation W was submitted to a registrant in connection with such housing.

.03 For the purposes of this General Order, the date of "completion" of any private war housing shall be the date upon which such housing is offered for initial rental or sale, or the date upon which

such housing is first ready for immediate occupancy, whichever is later.

.04 The phrase "held for rental" includes only an ordinary landlord-tenant relationship or such a tenancy coupled with an option to purchase containing the following provisions:

a. The tenant shall not be obligated to purchase and the option shall run only in behalf of the tenant;

b. No payment shall be required in any one month in addition to the listed monthly payment while a tenant, which monthly payment shall not exceed the fair rental for the dwelling unit under an ordinary landlord-tenant relationship not coupled with an option to purchase;

c. The monthly payment while a tenant shall not be in excess of rental for comparable accommodations;

d. The total purchase price shall be a fair market price, or $6,000, whichever is lower;

e. The option may not be exercised prior to the expiration of four months' occupancy;

f. The option shall continue in effect for at least 30 months unless sooner exercised; and

g. The occupancy and disposition provisions shall continue to apply to such housing after the option is exercised, or terminated, for the duration of the national emergency declared by the President on September 8, 1939.

Section 3—Persons Who Are Eligible War Workers

.01. For private war housing begun on or after February 10, 1943, an eligible war worker shall be only a person who qualifies under the provisions of NHA General Order No. 60-1.

.02. For private war housing begun prior to February 10, 1943, an eligible war worker shall be only a person who qualifies under the provisions of the application (and other instruments related thereto) for priority assistance or authority to begin construction, FHA insurance, or exemption from Federal Reserve Board Regulation W submitted in connection with such housing; or, at the option of the owner of such housing, a person who qualifies under the provisions of NHA General Order No. 60-1.

Section 4—Length of Time Private War Housing Must Be Reserved for Occupancy by Eligible War Workers

.01. Private war housing begun on or after February 10, 1943, shall be made available for initial occupancy, and for reoccupancy, only by eligible war workers; provided, however, that at any time subsequent to 60 days after completion of such housing, the owner of such housing may petition the National Housing Agency to permit initial occupancy, or reoccupancy, as the case may be, by a person other than an eligible war worker, in accordance with NHA General Order No. 60-3.

.02. Private war housing begun prior to February 10, 1943, shall be made available for initial

occupancy, and for reoccupancy, by eligible war workers for at least the period of time after completion specified in the application (and other instruments related thereto) for priority assistance or authority to begin construction, FHA insurance, or exemption from Federal Reserve Board Regulation W submitted in connection with such housing. Whenever any such application (or other instruments related thereto) provided for an exclusive preference to eligible war workers for a specified time, such exclusive preference shall be so given for at least such specified time; and whenever any such application (or other instruments related thereto) provided for merely a general preference to eligible war workers, at least such general preference shall be so given for at least such specified time.

Section 5—Disposition of Private War Housing

.01. Private war housing begun on or after February 10, 1943, shall be held for rental only to eligible war workers for the duration of the national emergency declared by the President on September 8, 1939, and, except for involuntary transfers, shall be disposed of only as follows:

a. An occupant, after four months' occupancy, may purchase the private war housing unit occupied by him subject to NHA General Order No. 60-3.

b. A person who will not himself occupy such housing may purchase or otherwise acquire such housing at any time, in accordance with NHA Gen-

eral Order No. 60-3, provided the occupancy and disposition limitations applicable to such housing prior to such purchase or acquisition shall continue to be applicable to such housing after such purchase or acquisition, or

c. At any time subsequent to 60 days after completion of any such housing, the owner of such housing may petition the National Housing Agency, in accordance with NHA General Order No. 60-3, to permit such housing to be disposed of otherwise than as provided above in this subsection 5 .01.

.02. Private war housing begun prior to February 10, 1943, shall be rented, sold, or transferred only in accordance with the provisions of the application (or other instruments related thereto) for priority assistance, authority to begin construction, or exemption for Federal Reserve Board Regulation W submitted in connection with such housing, except that whenever any such application for priority assistance or authority to begin construction provided that such housing could be disposed of, with the prior approval of the War Production Board, otherwise than as stated in such application, a prior approval by the National Housing Agency (instead of by the War Production Board) shall be required in order to dispose of such housing otherwise than as stated in such application. NHA General Order No. 60-3 sets forth the provisions regarding the disposition of such housing.

Admitted in evidence December 5, 1951.

Mr. Chehock: Respondent offers in evidence as Exhibit P, the National Housing Agency's General Order No. 60-3.

The Court: Received in evidence as Respondent's Exhibit P. [32]

(The document above referred to was received in evidence and marked Respondent's Exhibit P.)

RESPONDENT'S EXHIBIT P

NHA General Order No. 60-3
(Appears in Federal Register as Title 24, Chapter VII)

Approved 2/2/43

Effective 2/5/43

JOHN B. BLANDFORD, JR.,
Administrator.

Operating Manual
National Housing Agency
Office of the Administrator

Original Filed in Office of Director, Administrative Relations Division

Subject: Public Regulations—Methods of Disposition of Private War Housing Including Rent Levels, Sales Prices, and Petitions to the National Housing Agency.
(Applies to all employees and representa-

tives of the National Housing Agency and to all persons engaged in the management of Private War Housing for War Workers.)

Section 1. General Policy

.01. The National Housing Agency occupancy and disposition policies applicable to all private war housing are stated in NHA General Order No. 60-2. The purpose of this order is to promulgate regulations implementing such policies.

Section 2. Definitions

.01. As used in this order, the following terms are defined as follows:

a. "Private war housing," "begun," "completion," and "held for rental," shall have the meaning ascribed to them in NHA General Order No. 60-2;

b. "Sale price" means the total consideration paid by the purchaser, excluding those incidental charges which a purchaser of real estate customarily assumes in the community where the real estate is located;

c. "Shelter rent" means the total rent less reasonable allowances for tenant services;

d. "Tenant services" means those services and utilities which are customarily provided and paid for by a lessor of an unfurnished dwelling unit in the community where the real estate is located;

household furniture for a furnished dwelling unit is not included in "tenant services."

e. "Room" means only a living room, dining room, sleeping room, or kitchen, except that a kitchenette or dinette is considered as one-half room each.

Section 3. Disposition of Private War Housing

.01. For the duration of the national emergency declared by the President on September 8, 1939, all private war housing begun on or after February 10, 1943, shall be held for rental to eligible war workers as provided in NHA General Order No. 60-2, at the rentals specified in the application for priority assistance or authority to begin construction submitted in connection with such dwelling units, which rentals (unless otherwise authorized in Section 4 hereof) shall in no event exceed $50 per month shelter rent per unfurnished dwelling unit plus a reasonable charge for tenant services (in no event, exceeding $3 per month per room); and, except for involuntary transfers, shall be disposed of only as follows:

a. A dwelling unit in a private war housing project may be purchased by an occupant (initial occupant or reoccupant), after four months of continuous occupancy by such occupant if

(1) The sale price (except as provided in Secetion 4 hereof) is not in excess of the fair market price thereof, or $6,000, whichever is lower;

(2) The purchaser is an eligible war worker under the provisions of NHA General Order No. 60-1, and

(3) The owner submits to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, an agreement in the prescribed form (Form NHA 60-1), properly executed by the purchaser, stating that such purchaser will continue to occupy the dwelling unit or will hold the dwelling unit subject to all occupancy and disposition provisions set forth in NHA General Order No. 60-2.

A sale may be made under this paragraph (lettered "a") without obtaining further approval from the National Housing Agency, provided the above-mentioned Form NHA 60-1 is submitted to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, immediately following such sale.

b. Any such housing may be transferred to a person who will not occupy any part of such housing as his (or her) own dwelling, if

(1) The sale price (except as provided in Section 4 hereof) of each dwelling unit in such housing is not in excess of the fair market price thereof, or $6,000, whichever is lower, and

(2) The transferor submits to the National Housing Agency Regional Representative, through the local office of the Federal Housing

Administration, an agreement in the prescribed form (Form NHA 60-1), properly executed by the transferee, stating that such transferee will hold the premises subject to all occupancy and disposition provisions set forth in NHA General Order No. 60-2.

A transfer may be made under this paragraph (lettered "b") without obtaining further approval from the National Housing Agency, provided the above-mentioned Form NHA 60-1 is submitted to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration immediately following such transfer.

c. At any time subsequent to 60 days after completion of any private war housing, the original owner, or any subsequent owner, of such housing may petition the National Housing Agency to permit such housing to be disposed of otherwise than as provided above in this sub-section 3. .01. Any such petition shall be submitted to a National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, on a properly executed Form NHA 60-2. Each National Housing Agency Regional Representative is hereby authorized to grant such relief to persons who petition under this paragraph as the National Housing Agency Regional Representative deems appropriate, in the particular case, by relaxing the occupancy and disposition provisions applicable to such housing. Any relaxation of such occupancy and disposition

provisions may permit a shortening of any holding period applicable to such housing or a liberalization of the definition of eligible war worker applicable to such housing, or both; may permit a change in rent level or sale price in accordance with Section 4 of this General Order; and, in exceptional cases, where the National Housing Agency Regional Representative determines that there is no further need for reserving such housing for eligible war workers, the occupancy and disposition provisions may be removed entirely from such housing.

.02. All private war housing begun prior to February 10, 1943, the ownership of which has been transferred since such housing was begun, may be rented, sold, or otherwise disposed of at the option of the owner without exception.

.03. All private war housing begun prior to February 10, 1943, which has not been transferred since such housing was begun, may be rented, sold, or otherwise disposed of at the option of the owner except that for the duration of the national emergency declared by the President on September 8, 1939:

a. Rentals or sales prices (except for involuntary transfer and except to the extent approved prior to February 10, 1943, by the War Production Board, or subsequent to February 10, 1943, by the National Housing Agency) shall not exceed the respective maximum amounts permitted by the conditions of the application (or other instruments related thereto) for priority assistance, authority to begin

construction, or exemption from Federal Reserve Board Regulation W submitted in connection with such housing; and the requirements of such application (or other instruments related thereto) with respect to occupancy preference to war workers shall be complied with; or

b. All such housing constructed with priority assistance, or with authority to begin construction, obtained from the War Production Board by filing an application for such assistance or authority on Form PD-105 (Revised 4-23-42), or Form PD-200 accompanied by a form Applicants' Supplemental Certification if such application was for authority to begin construction of housing not to be occupied by the owner, may be disposed of, except for involuntary transfer, only as provided in such application or as follows:

(1) If such application did not provide for sale, such housing may be sold subject to the provisions set forth in sub-section 3. .01, above, or

(2) If such application did not provide for rent or lease-option, such housing may be rented, with or without an option to purchase, after the National Housing Agency Regional Representative for the area in which such housing is located has approved the initial rent or the lease-option payments for such housing. Any petition requesting such an approval of the initial rent or the lease-option payments for

such housing shall be submitted to a National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, on a properly executed Form NHA 60-3. Each National Housing Agency Regional Representative is hereby authorized to approve in the particular case the amount of such initial rent or lease-option payments.

Section 4. Adjustment of Rent or Sale Price

.01. The initial rent charge prior to any occupancy or the sale price for any housing accommodations in a private war housing project may be increased over the amount provided thereto in Section 3 of this General Order only when approved by the National Housing Agency. The owner of any such housing may petition the National Housing Agency to permit an increase in rent charge or sale price at any time. Any such petition shall be submitted to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, on a properly executed Form NHA 60-4. Each National Housing Agency Regional Representative is hereby authorized to grant such relief as he deems appropriate in the particular case, provided the petition for relief shows clearly that the owner has incurred, or will incur, costs in the construction of such housing, over which the owner had or has no control, in excess of the costs estimated originally in connection with such housing.

.02. Any request for permission to increase the rent charge for any private war housing after such housing has been occupied initially must be submitted to the local office of the Office of Price Administration.

Admitted in evidence December 5, 1951.

Mr. Chehock: Respondent offers in evidence as Exhibit Q, National Housing Agency's General Order No. 60-3b.

The Court: Received in evidence as Respondent's Exhibit Q.

(The document above referred to was received in evidence and marked Respondent's Exhibit Q.)

RESPONDENT'S EXHIBIT Q

NHA General Order No. 60-3B
(Supersedes NHA General Order 60-3A, which should be destroyed)

Approved 8/23/43.

Effective 8/25/43.

JOHN B. BLANDFORD, JR.,
Administrator.

Operating Manual
National Housing Agency
Office of the Administrator

Original Filed in Office of Director, Administrative Relations Division

Subject: Public Regulations—Methods of Disposition of Private War Housing Including Rent Levels, Sales Prices, and Petitions to the National Housing Agency.
(Applies to all employees and representatives of the National Housing Agency and to all persons engaged in the management of Private War Housing for War Workers.)

Section 1. General Policy.

.01. The National Housing Agency occupancy and disposition policies applicable to all private war housing are stated in NHA General Order No.

60-2. The purpose of this order is to promulgate regulations implementing such policies.

Section 2. Definitions

.01. As used in this order, the following terms are defined as follows:

a. "Private war housing," "begun," "completion," and "held for rental" shall have the meaning ascribed to them in NHA General order No. 60-2;

b. "Sale price" means the total consideration paid by the purchaser for the dwelling unit described in the priority application as approved, excluding those incidental charges which a purchaser of real estate customarily assumes in the community where the real estate is located;

c. "Shelter rent" shall have the meaning ascribed to it in NHA General Order No. 60-9;

d. "Tenant services" shall have the meaning ascribed to it in NHA General Order No. 60-9;

e. "Room" means only a living room, dining room, sleeping room, or kitchen, except that a kitchenette or dinette is considered as one-half room each.

Section 3. Disposition of Private War Housing

.01. For the duration of the national emergency declared by the President on September 8, 1939, all private war housing begun on or after February 10, 1943, shall be held for rental to eligible war workers as provided in NHA General Order No. 60-2, at the

payments specified in the application for priority assistance or authority to begin construction submitted in connection with such dwelling units, which total monthly payments (unless otherwise authorized in Section 4 hereof) shall in no event exceed $50 per month shelter rent per unfurnished dwelling unit plus a reasonable charge for tenant services (in no event, exceeding $3 per month per room), plus a reasonable price for garage space, plus the actual cost on a pro rata basis of tenant gas and electricity; and, except for involuntary transfers, shall be disposed of only as follows:

a. (i) A dwelling unit in a private war housing project may be purchased by an occupant (initial occupant or reoccupant) after two months' continuous occupancy by such occupant. (ii) Without conforming to (i) which precludes selling except at the option of the eligible war worker occupant exercised after at least two months' rental occupancy, a dwelling unit in a private war housing project may be held for sale or sold to an eligible war worker, provided that any sale so made shall take place not later than 15 days after the Federal Housing Administration makes its final Priority Compliance Inspection Report ("Completion Report") with respect to the unit (after which time the unit if not sold shall be held for rental as indicated in (i), and provided, further, that no owner shall sell more than one-third of the units in all projects (begun on or after February 10, 1943) which he has placed under actual construction in any war

housing area except such sales as are made in conformity with the requirement of holding for rental as indicated in (i), and provided, further, that any sale made pursuant to (ii) shall be within a price range for the general types of units intended to be sold which is acceptable to the National Housing Agency. The proposed price range shall be submitted to the Federal Housing Administration in advance of any sale by letter or other appropriate method, and in the case of all PD-105 applications filed on or after August 1, 1943, shall be submitted with the application. Any sale, either with or without prior rental occupancy, is subject to the conditions that:

(1) The sale price (except as provided in Section 4 hereof) is not in excess of the fair market price thereof, or $6,000, whichever is lower;

(2) The purchaser is an eligible war worker under the provisions of NHA General Order No. 60-1, and

(3) The owner submits to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, an agreement in the prescribed form (Form NHA 60-1), properly executed by the purchaser, stating that such purchaser will continue to occupy the dwelling unit or will hold the dwelling unit subject to all occupancy and disposition provisions set forth in NHA General Order No. 60-2.

A sale may be made under this paragraph (lettered "a") without obtaining further approval from the National Housing Agency, provided the above-mentioned Form NHA 60-1 is submitted to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, immediately following such sale.

b. Any such housing may be transferred to a person who will not occupy any part of such housing as his (or her) own dwelling, if

(1) The sale price (except as provided in Section 4 hereof) of each dwelling unit in such housing is not in excess of the fair market price thereof, or $6,000, whichever is lower, and

(2) The transferor submits to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, an agreement in the prescribed form (Form NHA 60-1), properly executed by the transferee, stating that such transferee will hold the premises subject to all occupancy and disposition provisions set forth in NHA General Order No. 60-2.

A transfer may be made under this paragraph (lettered "b") without obtaining further approval from the National Housing Agency, provided the above-mentioned Form NHA 60-1 is submitted to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration immediately following such transfer.

c. An eligible war worker under NHA General Order No. 60-1 may file an application for priority assistance for a private war housing unit suitable to his needs, and upon approval of such application may build, own and occupy such unit without conformity to rental requirements, provided that such war worker submits satisfactory evidence to the Federal Housing Administration that he has the bona fide intention and capacity to build for himself and is not being utilized to circumvent the rental requirements which exist for his protection. Any disposition of such unit by such war worker shall be subject to the rules of disposition set forth in this sub-section 3.01.

d. At any time subsequent to 60 days after completion of any private war housing, the original owner, or any subsequent owner, of such housing may petition the National Housing Agency to permit such housing to be disposed of otherwise than as provided above in this sub-section 3.01. Any such petition shall be submitted to a National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, on a properly executed Form NHA 60-2. Each National Housing Agency Regional Representative is hereby authorized to grant such relief to persons who petition under this paragraph as the National Housing Agency Regional Representative deems appropriate, in the particular case, by relaxing the occupancy and disposition provisions applicable to such housing. Any relaxation of such occupancy and disposi-

tion provisions may permit a shortening of any holding period applicable to such housing or a liberalization of the definition of eligible war worker applicable to such housing, or both; may permit a change in rent level or sale price in accordance with Section 4 of this General Order; and, in exceptional cases, where the National Housing Agency Regional Representative determines that there is no further need for reserving such housing for eligible war workers, the occupancy and disposition provisions may be removed entirely from such housing.

.02. All private war housing begun prior to February 10, 1943, the ownership of which has been transferred since such housing was begun, may be rented, sold, or otherwise disposed of at the option of the owner without exception.

.03. All private war housing begun prior to February 10, 1943, which has not been transferred since such housing was begun, may be rented, sold, or otherwise disposed of at the option of the owner except that for the duration of the national emergency declared by the president on September 8, 1939:

a. Rentals or sales prices (except for involuntary transfer and except to the extent approved prior to February 10, 1943, by the War Production Board, or subsequent to February 10, 1943, by the National Housing Agency) shall not exceed the respective maximum amounts permitted by the conditions of the application (or other instruments related thereto) for priority assistance, authority to begin

construction, or exemption from Federal Reserve Board Regulation W submitted in connection with such housing; and the requirements of such application (or other instruments related thereto) with respect to occupancy preference to war workers shall be complied with; or

b. All such housing constructed with priority assistance, or with authority to begin construction, obtained from the War Production Board by filing an application for such assistance or authority on Form PD-105 (revised 4-23-42), or Form PD-200 accompanied by a form Applicants' Supplemental Certification if such application was for authority to begin construction of housing not to be occupied by the owner, may be disposed of, except for involuntary transfers, only as provided in such application or as follows:

(1) If such application did not provide for sale, such housing may be sold subject to the provisions set forth in subsection 3.01(i) above (provided that the purchaser may be a person who has occupied the housing continuously for two months and who is an eligible war worker either under the provisions of NHA General Order No. 60-1 or the provisions of the application for priority assistance or authority to begin construction submitted in connection with such housing), or

(2) If such application did not provide for rent or lease-option, such housing may be rented,

with or without an option to purchase, after the National Housing Agency Regional Representative for the area in which such housing is located has approved the initial rent or the lease-option payments for such housing. Any petition requesting such an approval of the initial rent or the lease-option payments for such housing shall be submitted to a National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, on a properly executed Form NHA 60-3. Each National Housing Agency Regional Representative is hereby authorized to approve in the particular case the amount of such initial rent or lease-option payments.

Section 4. Adjustment of Rent or Sale Price

.01. The initial rent charge prior to any occupancy or the sale price for any housing accommodations in a private war housing project may be increased over the amount provided therefor in Section 3 of this General Order only when approved by the National Housing Agency. The owner of any such housing may petition the National Housing Agency to permit an increase in rent charge or sale price at any time. Any such petition shall be submitted to the National Housing Agency Regional Representative, through the local office of the Federal Housing Administration, on a properly executed Form NHA 60-4. Each National Housing Agency Regional Representative is hereby authorized to grant such relief as he deems appropriate

in the particular case, provided the petition for relief shows clearly that the owner has incurred, or will incur, costs in the construction or operation of such housing, over which the owner had or has no control, in excess of the costs estimated originally in connection with such housing.

.02. Any request for permission to increase the rent charge for any private war housing after such housing has been occupied initially must be submitted to the local office of the Office of Price Administration.

Section 5. Modification of Occupancy and Disposition Provisions by Regional Representatives

.01. Each National Housing Agency Regional Representative is hereby authorized on his own initiative to relax the occupancy and disposition provisions applicable to any private war housing, where such action is deemed appropriate in the interests of the war housing program. Any relaxation of such occupancy and disposition provisions may permit a shortening of any holding period applicable to such housing or a liberalization of the definition of eligible war worker applicable to such housing, or both; may permit a change in rent level or sale price in accordance with Section 4 of this General Order; and, in exceptional cases, where the National Housing Agency Regional Representative determines that there is no further need for reserving such housing for eligible war workers, the occupancy and disposition provisions may be removed

entirely from such housing. When so acting on his own initiative, the Regional Representative may act without reference to whether the housing has been completed or whether it has been occupied for 60 days after completion. When such relaxation or removal of occupancy and disposition provisions is contemplated for an entire locality or for a very substantial volume of private war housing, as distinguished from individual cases or relatively small volumes of housing, the Regional Representative shall advise the Office of the Administrator prior to taking action.

Admitted in evidence December 5, 1951.

Mr. Chehock: Respondent offers in evidence a typical agreement for all of the real estate form contract signed for the 69 multiple houses sold that are here in controversy. That is correct, isn't it, counsel?

Mr. Conroy: Yes, that is correct.

The Court: Received in evidence as Respondent's Exhibit R.

(The document above referred to was received in evidence and marked Respondent's Exhibit R.)

RESPONDENT'S EXHIBIT R

Agreement for Sale of Real Estate

This Agreement, made in duplicate this 10th day of January, 1945, between Security Construction Company, a co-partnership, hereinafter called Seller, and Poul Jensen, a widower, hereinafter called Buyer,

Witnesseth:

The Seller agrees to sell and the Buyer agrees to buy Lot 16, Tract 13170, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 253, pages 12 and 13 of Maps, Records of said County; subject to reservations, restrictions, easements and covenants of record recorded in Book 20305, page 191 of Official Records of said County, any lease, and other matters hereinafter stated, for the sum of $16,900.00, lawful money of the United States which Buyer agrees to pay as follows:

Cash on execution of this Agreement.....$ 1,750.00

Unpaid balance owing to Glendale Federal Savings and Loan Association.....$11,801.56

Principal in monthly payments as hereinafter stated .....$ 3,348.44

Total $16,900.00

Said principal sum of $11,801.56 owing to Federal Savings & Loan Association of Glendale, California, is evidenced by a note, and payment thereof is secured by a first Trust Deed lien on the above-de-

scribed property. Payments thereon are due on the 1st day of each month in the amount of $89.26, and said monthly payments include interest, taxes and insurance as provided therein.

Buyer assumes and agrees to pay the amounts owing to said Federal Savings and Loan Association of Glendale as provided in said note and Trust Deed and agrees to do and perform each and every term and provision of said note and Trust Deed.

The monthly payments to be made to said Federal Savings and Loan Association shall be made to the Seller until such time as the deed hereinafter mentioned is executed, who will then pay the amount to said Federal Savings and Loan Association.

The said principal sum of $3,348.44 shall be payable to the Seller in installments of $40.00 or more on the 1st day of each month hereafter until said amount is paid in full. The monthly payments include interest at the rate of six (6%) per cent per annum, and the balance of each of said payments shall be credited each month on unpaid principal. The first of said monthly installments shall be adjusted so as to make said monthly installments payable on the same day as the monthly installments due to said Federal Savings and Loan Association.

The Buyer agrees to pay current taxes assessed against said property for the months of the tax year July 1, 1944, to July 1, 1945, ensuing the date of this Agreement, and all taxes assessed and levied thereon after July 1, 1945, and fire insurance premiums in an amount sufficient to cover the interest of said

Federal Savings and Loan Association and the Seller so long as this Agreement is in force.

The deposit of money for insurance premiums in the amount of $..... made by the Seller with the Glendale Federal Savings & Loan Association are to be returned to the Seller and the Buyer will deposit the amount with said Association at the time this Agreement is executed.

The said property is income property. If the Buyer defaults in any of the terms and provisions on his part herein agreed to be kept and performed, Buyer hereby authorizes the Seller to collect any rents accruing from said premises and apply the same, less reasonable cost of collection, on the payments accruing hereunder so long as any such default continues. Such collection by the Seller shall not cure any default of the Buyer hereunder except as to the amount applied on payments in default. The request of the Seller to any tenant to pay rent to it shall be sufficient authority for the tenant to make the payment requested.

The said premises shall be used and occupied only for one family residence in each unit thereof.

The Buyer agrees to keep said premises in good repair and condition and permit no waste to be committed thereon throughout the existence of this Agreement.

Buyer assumes and agrees to pay the indebtedness above mentioned owing to Glendale Federal Savings and Loan Association, and assumes and agrees to pay said indebtedness and also agrees that he will at all times hold the property above described and each

unit thereof subject to all occupancy and disposition provisions set forth in National Housing Agency General Order 60-1.

The Buyer agrees that he will not permit said property to become subject to any lien or encumbrance or to make or suffer any alterations to be made in or on said property without the written consent of Seller.

It is expressly understood and agreed that time is the essence of this Agreement.

In the event of the failure of Buyer to comply with all or any of the terms or provisions herein agreed to be kept and performed by him, Seller may at its option declare this Agreement terminated and of no further force or effect upon five days' written notice to the Buyer delivered personally to the Buyer or to any tenant occupying any unit of the above-mentioned property, or by mail addressed to the Buyer at his last known address. Should the Seller give such notice of termination of this Agreement it shall be released from all obligations in law or equity to convey said premises to the Buyer, and the Buyer shall forfeit all rights thereto and to all monies theretofore paid under this Agreement as liquidated damages. And in the event of any such default and termination of this Agreement Buyer agrees to deliver to Seller immediate possession of said property, and Seller may take such possession without demand upon or notice to Buyer, and this provision shall not be waived or impaired by any act of Seller in granting extensions of time or other indulgence to Buyer.

The Seller on receiving full payment of all sums herein mentioned which the Buyer agrees to pay, except the balance then due to said Federal Savings and Loan Association, and upon Buyer complying with all of the terms and conditions of this Agreement except as to the payment last above mentioned, the Seller agrees to deliver to Buyer a good and sufficient Deed conveying said property to Buyer free of encumbrances except taxes, assessments, conditions, restrictions, reservations, rights of way of record, and any encumbrance or lien suffered or done by the Buyer and any lien or encumbrance evidencing the balance of any indebtedness owing to said Glendale Federal Savings and Loan Association. Upon the execution of said deed the Seller will deliver to the Buyer a policy of title insurance showing title vested in the Seller as above stated.

All the terms and provisions hereof shall bind and inure to the benefit of the parties hereto, their heirs, executors, administrators, successors and assigns.

In Witness Whereof the said parties have caused this Agreement to be executed the day and year first above written.

SECURITY CONSTRUCTION COMPANY,
a Co-partnership.

By /s/ EDGAR M. COHN,
Seller.

/s/ POUL H. JENSEN, AKA
Buyer.

Admitted in evidence December 5, 1951.

Mr. Chehock: Respondent offers into evidence as Exhibit S the sales contract, or a copy of the same, entered into between the partnership, the Security Construction Company, and Eddy D. Field, the licensed real estate broker, dated February 13, 1945.

The Court: Was that a contract evidencing a sale of some of these houses to Mr. Field?

Mr. Chehock: The contract is quite a lengthy one, [33] but I understand that Field was authorized to buy the houses, himself, at a certain figure, and was, under the contract, required to sell the houses, to sell a certain portion of them within a certain length of time, to keep the contract alive. Isn't that right?

Mr. Conroy: Yes.

The Court: Received in evidence as Respondent's Exhibit S.

(The document above referred to was received in evidence and marked Respondent's Exhibit S.)

RESPONDENT'S EXHIBIT S

February 13th, 1945.

Sales Contract

The undersigned (hereinafter called the owner) appoints Eddy D. Field, Licensed Real Estate Broker (hereinafter called the Agent) sole and exclusive agent for a period of 90 days from February 13th, 1945, to negotiate the sale of real property described as follows:

Thirty (30) four-family buildings known as Lots 110 to 122, inclusive, Tract 13171, City of Los Angeles. Lots 1 to 9, inclusive; Lots 12 to 13, inclusive; Lots 18 to 23, inclusive; Tract 13170. City of Los Angeles. Thirty-one (31) two-family buildings known as Lots 24 to 41, inclusive; Lots 43 to 48, inclusive; Lots 50 to 56, inclusive; Tract 13170 in the City of Los Angeles.

The owner agrees to accept $15,500 Net Sales price on each 4-unit building with a minimum cash down payment of $1450.00. Buyer to assume and agree to pay F.H.A. Loan is to be carried on owner's form of Contract. The contract payments are to be on the basis of approximately one and one-half (1½) per cent per month, or more, including six (6) per cent interest and Contract to run until paid.

The owner agrees to accept $8100.00 net sales price for 31 two-family buildings. Seller agrees to accept a down payment of $850.00 Net Cash, balance approximately $6400.00 of F.H.A. Loan, payable approximately $49.50 per month. The difference between the Cash Net down payment and the F.H.A.

Loan to be carried on owner's form of Contract, payable approximately two (2) per cent, or more, per month including interest at six (6) per cent and Contract to run until paid.

A Grant Deed will be deposited with the Glendale Federal Savings and Loan Association with instructions to deliver to buyer when all provisions of said contract have been fulfilled by said buyer, and seller agrees to deliver Policy of Title Insurance guaranteeing Title to be free and clear of encumbrances except F.H.A. Loan of Record and usual conditions and restrictions when Contract has been paid in full.

For valuable consideration including the effort to be made by Eddy D. Field and his Agents and Brokers and employees to sell the above-described property the undersigned hereby appoints said Eddy D. Field Exclusive and Sole Agent for a period of 90 days from date hereof to sell said property at the price and upon the terms and conditions stated herein. This appointment is irrevocable during said 90 day period. Undersigned hereby expressly agrees that said Eddy D. Field may during the period of this agreement purchase said property at the price and on the terms stated hereon.

Undersigned hereby expressly represents and warrants that he is the sole owner of said property, and has the sole and exclusive right to sell said property on the terms set forth above and said undersigned agrees that he will not enter into any agreement, either directly or indirectly for the sale of said property with any other person, firm or corporation during the period of this exclusive agency.

In case of sale of said property during the term of this agreement, whether made by undersigned, by Eddy D. Field, or his agents or brokers, or through or by any other agency, or subsequent to the termination hereof to any party introduced to undersigned by Eddy D. Field, or his agents or brokers, or if Eddy D. Field produces a purchaser ready, willing and able to purchase said property at the price, and on the terms and conditions above, during the term of this agreement, undersigned agrees to pay to said Eddy D. Field the regular Los Angeles Realty Board commission of five per cent on the sale price. In the event a sale of said property is made within 30 days after the termination of this agreement to parties with whom said Eddy D. Field, his agents or brokers have negotiated by reason of this agreement, and said Eddy D. Field, his agents or brokers, notify undersigned by mail, or personally, of such negotiations within ten days after the termination of this agency, undersigned agrees to pay said Eddy D. Field the commission hereinabove stated.

Seller will furnish when contract is paid in full at his expense policy of title insurance issued by title company designated by the agents, showing title free and clear of all encumbrances, except as above noted, together with a good and sufficient Grant Deed. Taxes, insurance, rents, and interests to be prorated to date of close of escrow. Seller agrees to pay usual seller's escrow charges and expenses. Right to show property at any time is given agent.

The owner hereby grants the option of extending

this agreement for an additional 90 days on same terms and conditions providing one-half of the above-mentioned buildings have been sold within 90 days from date of this agreement.

A building is construed to be sold when all monies has been disbursed from the escrow.

Buyer must be of the White or Caucasian Race.

Any monies forfeited because of breach on the part of the buyer shall be divided equally between the owner and the agent.

Eddy D. Field agrees to pay for all advertising in connection with the sale of the property.

EDGAR M. COHN,
Security Construction
Company, Co-Partner.

.....

Security Construction Company.

Approved by:

/s/ EDDY D. FIELD.

Admitted in evidence December 5, 1951.

Mr. Chehock: I think that is all, your Honor, for now.

Mr. Conroy: I have two more exhibits that counsel and I have agreed to introduce. May I proceed?

The Court: Yes.

Mr. Conroy: I would like to offer into evidence Form No. NHA-60-1, which is entitled "Notice of

Sale of Private War Housing," and which was required to be signed by the purchaser and the seller of rental housing.

The Court: Received in evidence as Petitioners' Exhibit 17.

(The document above referred to was received in evidence and marked Petitioners' Exhibit No. 17.)

Mr. Conroy: I would like to offer in evidence a lease dated May 1, 1944, between the Security Construction [34] Company and Leon Ottgen and his wife, with reference to Lot 4, which is 8026 DeGarmo Avenue. There is a waiver attached showing the lease was canceled October 31, 1944.

I offer this as a typical example of all of the forms of all leases entered into, and a typical example of all of the forms of waiver.

The Court: Received in evidence as Petitioners' Exhibit No. 18.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 18.)

RESPONDENT'S EXHIBIT No. 18

Waiver

In consideration of the sum $10.00 in hand paid, we, Leon Ottgen and Marguerite Ottgen, husband and wife, do hereby waive all our right, title and interest in and to the within lease dated May 1, 1944, between Security Construction Company and ourselves covering 8026 De Garmo Avenue, Roscoe, California.

Dated: October 31, 1944.

/s/ LEON OTTGEN,
LEON OTTGEN.

/s/ MARGUERITE OTTGEN,
MARGUERITE OTTGEN.

The Court: Do you gentlemen have any other exhibits?

Mr. Conroy: No.

Mr. Chehock: None at this time.

The Court: Will you call your first witness? The practice in this court is to have the witness sit at the end of the tabe, if that is agreeable with you. It is a little difficult for the witness to manage to face and address counsel on either side of the room, and if you find this is inconvenient in any way at all, we will change it around.

Mr. Conroy: I think it shall be very satisfactory. May I suggest that the witness talk to the Judge and to the reporter, and not necessarily look at me, and everybody will hear you.

The Court: Chiefly to the reporter.

Mr. Conroy: You asked if there were [35] any other exhibits. I will have other exhibits as the trial progresses.

The Court: Yes, I understand.

Whereupon,

EDGAR M. COHN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address for the record.

The Witness: Edgar M. Cohn, 801 North Sierra Drive, Beverly Hills.

Direct Examination

By Mr. Conroy:

Q. What is your business or occupation?

A. I am in the real estate business with the construction of buildings for sale and for investment.

Q. How long have you been engaged in that business? A. Since 1941.

Q. Are you associated with anyone in that business?

A. Yes. With my brother, Daniel E. Cohn.

Q. Now, when was the partnership—the partnership, the Security Construction Company, was formed in 1942, is that right? A. Yes.

Q. Were the partners at that time your brother and [36] yourself? A. Yes.

Q. Mr. Cohn, in order to shorten the examination here, it has been stipulated by the written stipulation that you and your brother did subdivide and build single-family residences and sell 130 single-family residences on Tract 13172 in the City of Los Angeles. A. Yes.

Q. I will ask you what your next development was.

(Testimony of Edgar M. Cohn.)

A. Our next development was the construction of 56 multiple buildings on Tract 13170.

Q. Prior to the construction of those buildings, did you have any dealings with the Federal Housing Administration?

A. Yes. We were in constant communication with the Federal Housing Administration, in order to determine if any priorities were available for the construction of buildings in our particular area.

When we learned in the early summer of 1943 that there were 1,000 units programmed in the San Fernando Valley within a certain radius of defense plants, we inquired what we had to do in order to obtain some of those priorities.

Q. Where did you go for that purpose?

A. We went to the Federal Housing Administration in Los Angeles here.

Q. Whom did you talk to? [37]

A. Mr. Madden.

Q. Who is Mr. Madden, if you know?

A. Mr. Madden at that time was in charge of allocating priorities to builders.

Q. In this area? A. In this area.

Q. Did you have any conversation with him concerning the building of buildings on Tract 13172 in the City of Los Angeles?

A. That is Tract 13170.

Q. Yes.

A. Yes, we had several discussions with him and he informed us that in order to obtain priorities we had to construct multiple units or apartment build-

(Testimony of Edgar M. Cohn.)

ings instead of single-family buildings as was our custom of building.

Q. And did you make any application for priorities? A. Yes, we did in 1943.

Q. I show you Petitioners' Exhibit No. 7, which appears to be a priority dated July 17, 1943, and I will ask you whether those are the priorities that you first obtained for the building of multiple residences on Tract 13170? A. Yes.

Q. Do you know when the priorities were first issued to you? A. In July, 1943. [38]

Q. And did you surrender the first priorities that were issued to you? A. As I recall, I did.

Q. And then, eventually, did you receive Exhibit No. 7? A. Yes.

Q. When did you start construction of the multiple buildings on Tract 13170?

A. Approximately October 1, 1943.

Q. When did you complete the construction of those buildings? A. In June of 1944.

Q. They were completed in various stages?

A. Yes.

Q. What was the earliest date any were completed? A. In February, 1944.

Q. When you first went to the Federal Housing Administration to obtain priorities for buildings on Tract 13170, did you make any applications for single-family residences?

A. We made verbal application in our discussion with Mr. Madden.

(Testimony of Edgar M. Cohn.)

Q. That is when you were advised that you would not be issued priorities at that time?

A. For single dwellings.

Q. At the time that you got the application for these priorities and started construction of those buildings, what [39] did the partnership intend to do with the buildings?

A. We intended to sell the buildings.

Q. Did the time come when the partnership arrived at any other determination? A. Yes.

Q. When was that? A. December, 1943.

Q. And in December, 1943, what determination did the partnership make?

A. The partnership made the determination to hold the buildings for investment and rent the apartments.

Q. Where was your brother, Daniel, at that time?

A. In December, 1943, Daniel was in the Armed Forces of the United States.

Q. And you were running the partnership business? A. Yes.

Q. Your father was assisting you?

A. He was advising me.

Q. All right. Did you discuss this question of holding them for investment with anyone other than your father? A. Yes.

Q. Who did you discuss it with?

A. With Mr. Hollingsworth of the Glendale Federal Savings & Loan Association.

Q. When did you first discuss the matter with him? [40] A. In December, 1943.

(Testimony of Edgar M. Cohn.)

Q. What was his advice to you?

A. His advice to us was that through the medium of depreciation we would receive tax free income and could use that income to pay off the obligation that we had placed on the buildings, and thereby create an estate.

Q. Did he tell you you should hold it for investment purposes? A. Definitely, yes.

Q. Did you discuss that question with anyone else? A. With John E. Biby, our attorney.

Q. Where and when did that conversation take place, approximately?

A. That conversation took place at Mr. Biby's home the last week in December of 1943.

Q. Who was present?

A. My father, Max Cohn, Mr. Biby and myself.

Q. What advice did Mr. Biby give you with reference to that?

Mr. Chehock: What time was this?

Mr. Conroy: The last week of December, 1943. That is his testimony.

The Court: You may answer the question.

The Witness. He advised my father and myself to hold the buildings for investment. [41]

Q. (By Mr. Conroy): Did you figure what the net income would be, with Mr. Biby?

A. Yes. We had quite a discussion with Mr. Biby and we determined that the net income would be approximately $43,000.00 or $44,000.00 or approximately 12½ per cent return on the cost of the buildings.

(Testimony of Edgar M. Cohn.)

Q. And did you talk to anyone else concerning the subject? A. Yes.

Q. Who else? A. Mr. Harold K. Wood.

Q. When did you talk to him?

A. Shortly after the first of the year. I would say early in January in 1944.

Q. Where did you talk to Mr. Wood?

A. At Mr. Wood's office.

Q. What discussion did you have with him concerning that subject?

A. We discussed the advisability of holding the buildings for investment purposes. Mr. Wood advised us as to that fact and insisted that——

Q. Don't say "insisted." Tell us what he said.

A. He said that I should write him a letter advising him that the partnership had decided to hold the buildings [42] for investment purposes.

Mr. Conroy: Mr. Chehock, I think you have seen a copy of this letter.

Mr. Chehock: Yes.

Q. (By Mr. Conroy): Mr. Cohn, I show you a letter dated January 12, 1944, signed by Edgar M. Cohn. Is that your signature?

A. That is my signature.

Q. For what purpose was that letter written?

A. It was written to advise our accountant, as per his request, that we were engaged in holding these buildings for investment purposes and to set them up on the books for that purpose.

Mr. Conroy: If the Court please, I would like

(Testimony of Edgar M. Cohn.)

to introduce this in evidence as Petitioner's Exhibit next in order.

Mr. Chehock: No objection:

The Court: It is received in evidence as Exhibit 19.

(The document above referred to was received in evidence and marked Petitioners' Exhibit No. 19.)

PETITIONER'S EXHIBIT No. 19

Security Construction Company
Developers of Beautiful Glenwood
7801 Glen Oaks Boulevard
Burbank, California
STanley 7-3536

January 12, 1944.

Boyle & Wood,
Taft Bldg.,
Hollywood, California.

Gentlemen:

We are now building fifty-six buildings consisting of thirty-three doubles and twenty-three four family dwellings in Tract 13170, City of Los Angeles, within three-quarters of a mile from Lockheed Aircraft Corporation.

During the past three years we have built 200 single family dwellings, all of which we sold and are now occupied by war workers.

(Testimony of Edgar M. Cohn.)

After due and careful consideration, and in view of the fact that we are now engaged in building rental units, we have decided to rent all of the 158 units in the 56 buildings now under construction and hold same for investment purposes.

Respectfully yours,

SECURITY CONSTRUCTION COMPANY,

By /s/ EDGAR M. COHN,
Co-Partner.

EMC/DC

Admitted in evidence December 5, 1951.

Q. (By Mr. Conroy): Mr. Cohn, did you finance the construction of these houses with any institution?

A. With the Glendale Federal Savings & Loan Association, of Glendale. [43]

Mr. Conroy: May I have the exhibit that shows the financing of these homes by the Glendale Federal Savings & Loan Association?

The Court: I am going to return most of those exhibits to the Clerk. I will keep the maps because I don't believe you will need them, and it will be easier for you to locate the exhibit if the Clerk has them.

Mr. Conroy: I will refer to them by number.

The Court: Yes. I want you to do that, if you can.

(Testimony of Edgar M. Cohn.)

Q. (By Mr. Conroy): Mr. Cohn, I show you Petitioner's Exhibit No. 13, which was introduced into evidence as a schedule of loans made on the multiple buildings, 69 in all in Tracts 13170 and 13171 and I will ask you whether that sets forth a true statement of all the money that was borrowed on the buildings that were constructed on those two tracts? A. Yes.

Q. That does not contain a schedule of the single family units? A. No.

Q. What interest did you pay the Glendale Federal Savings & Loan Association?

A. 4½ per cent.

Q. What was the period of the loans?

A. 25 years. [44]

Q. What was the amount of the loan, the principal and interest, on the two-family buildings?

A. I don't remember the exact amount.

Q. If you don't remember, your accountant would know? A. Yes.

Q. Very well. Was the tax payable in installments?

A. The installment included the principal, interest, taxes impounds for insurance and mortgage insurance.

Q. Now, during the time that these buildings were being constructed and after you had made the determination to hold them for income, as you have testified, did you have any opportunities to sell the buildings? A. Yes.

(Testimony of Edgar M. Cohn.)

Q. Will you state how frequently the opportunities to sell the buildings came up?

A. Almost daily.

Q. And were they firm offers? That is, people offered to pay the price you eventually got?

The Court: Will the reporter please read the question?

(The question was read.)

The Witness: No. If I might explain——

Mr. Conroy: I wish you would explain it.

The Witness: At the time the buildings were under construction and nearing completion, almost daily I would [45] receive inquiries from prospective tenants and buyers—I will say prospective renters who were eligible to rent the apartment, asking if I would sell them the building, and my answer was no.

Q. (By Mr. Conroy): After the buildings had been constructed and occupied for a period of two months, which I understand is the required time that the law then required you to hold them for occupancy before you could sell them to tenants, did you receive any offers to purchase the buildings? A. The law stated at that time——

Q. I don't care what the law stated. Did you receive any offers? A. Yes.

Q. Were they frequent?

A. Quite frequent.

Q. What attitude did you take?

A. I refused to sell the buildings.

(Testimony of Edgar M. Cohn.)

Q. Did the time come when you did determine to sell the buildings? A. Yes.

Q. Will you state about when that was?

A. In the latter part of December, 1944.

Q. Did you discuss that matter with anyone?

A. Yes. [46]

Q. Whom did you discuss it with?

A. With Mr. John Biby.

Q. And what was your reason or the reason that you had for changing, for determining to sell the buildings?

A. There were rumors that the cessation of hostilities would be in the near future and that Lockheed Aircraft would discharge all but about 10 per cent of their employees and our apartment buildings, in our estimation, would have a 50 per cent vacancy factor.

After consultation with Mr. Biby, we decided to sell our assets.

Q. You mean these particular assets?

A. These particular assets.

Q. Do you know how many employees Lockheed had?

A. I did not know at that time. My estimate was 100,000.

Q. Was there publicity to that effect?

A. No. That was a carefully guarded secret.

Q. It was? A. Yes.

Q. The tenants of your buildings, were any of those tenants Lockheed employees?

(Testimony of Edgar M. Cohn.)

A. Over three-quarters were Lockheed employees.

Q. How far were you situated or how far were the multiple buildings in Tracts 13170 and 13171 situated from [47] Lockheed Aircraft?

A. Approximately three-quarters of a mile.

Q. After you had determined to sell these buildings, what action did you take?

A. I listed the buildings with two real estate brokers.

Q. Who were they?

A. Leon Hahn and Huff & Clair.

Q. When did you do that?

A. In January, 1945.

Q. Did Leon Hahn and Huff & Clair sell the buildings which are referred to and described in Petitioner's Exhibit 14? A. Yes.

Q. Now, did anybody else sell any of those multiple buildings in Tracts 13170 and 13171?

A. Yes.

Q. Who sold the remainder of them?

A. Eddy D. Field.

Q. How many did he sell?

A. He sold 61 buildings.

Q. I show you a copy of a sales contract, which is Respondent's Exhibit S, and ask you if that is a copy of the contract that you entered into with Eddy D. Field.

The Court: It has been stipulated that it is.

The Witness: Yes.

(Testimony of Edgar M. Cohn.)

The Court: In other words, I don't want to take the [48] time while he reads the contract through, because I have the original here.

Q. (By Mr. Conroy): Now, I show you Petitioners' Exhibit No. 15, and I will ask you whether the houses listed thereon are the ones that were purchased by Eddy D. Field and Roy McKee. When I say "houses," I mean multiple dwellings in those instances. A. Yes.

Q. Did you build any single-family residences in Tract No. 13171 at or about the time you were building the houses, the multiple houses?

A. Yes.

Q. How did you handle the sale of those houses?

A. The partnership employed a real estate broker to devote his exclusive time to the sale of these single-family houses.

Q. I show you what purports to be an agreement between the Security Construction Company and James C. Hotaling, with reference to Tract 13171, and I will ask you if that agreement has any reference to the sale of single-family houses in Tract 13171? A. Yes.

Q. And is that your signature on there?

A. Yes.

Q. And is Mr. Hotaling's signature on there, also? [49] A. Yes.

Q. Were the houses in Tract No. 13171 sold by Mr. Hotaling pursuant to this agreement?

A. The single-family houses were.

(Testimony of Edgar M. Cohn.)

Q. How many single-family houses did you have in that tract? A. 109.

Mr. Conroy: I would like to have this introduced in evidence, and ask permission to withdraw it to make photostatic copies for Mr. Chehock and my own files.

The Court: You may withdraw it to make photostatic copies. It is received in evidence as Petitioners' Exhibit 20.

(The document above referred to was received in evidence and marked Petitioners' Exhibit No. 20.)

PETITIONERS' EXHIBIT No. 20

Security Construction Company
Developers of Beautiful Glenwood
7801 Glen Oaks Boulevard
Burbank, California
CHase 7-8022

The Undersigned agrees to pay to James C. Hotaling, licensed broker, California State Broker's license 18785, the sum of Sixty and No/100 ($60.00) Dollars for each and every single house sold in Tract 13171 City of Los Angeles, on and after July 2, 1944, payable upon the completion of the down payment agreed upon.

(Testimony of Edgar M. Cohn.)

This Agreement can be cancelled upon three (3) days' written notice by either James C. Hotaling or the Security Construction Co.

SECURITY CONSTRUCTION COMPANY,

By /s/ EDGAR M. COHN,
Co-Partner.

Dated July 2, 1944.

Accepted:

/s/ JAMES C. HOTALING,
James C. Hotaling.

Admitted in evidence December 5, 1951.

Mr. Chehock: If counsel does not wish to leave it to be photostated, but wants to leave the original with the Court and have it typed up and give me a copy, that would be satisfactory.

Mr. Conroy: I won't be able to type it up, unless I take it with me.

Mr. Chehock: Either way. If it is to be left with the Court, I think the Court would like photostatic copies rather than a typed copy.

The Court: It doesn't make any difference. If counsel is agreeable to a type copy, that is all [50] right. Go ahead, please.

sold these 109 houses, did you advertise them?

Q. (By Mr. Conroy): Mr. Cohn, when you

(Testimony of Edgar M. Cohn.)

A. Yes.

Q. Who paid for the advertising?

A. The Security Construction Company.

Q. When you sold the apartment houses through Mr. Eddy D. Field and those other two brokers, concerning whom you have testified, did you advertise those?

A. The company did not advertise.

Q. Do you know whether Mr. Eddy D. Field or the other brokers advertised? A. Yes.

Q. You didn't pay for the advertising, is that right? A. To the best of my knowledge, no.

Q. If they were paid for by you, would it be on the books of the partnership? A. Yes.

Q. Now, Mr. Cohn, on Tract No. 13172, which was the 130 houses that you built first, appearing in the lower left-hand portion of Petitioners' Exhibit 5 on the board, did you yourself sell those or did you employ a broker to sell these?

A. The partnership employed a broker to sell those houses. [51]

Q. Did you have any arrangement to pay a flat amount for the sale of those houses? A. Yes.

Q. With reference to that tract, I will ask you whether or not you entered into an agreement dated October 4, 1942, with George W. Cochrane.

A. The Security Construction Company did, through my brother, Daniel Cohn.

Q. Your brother Daniel was around in October, 1942? A. That is right.

Q. That contract provided for the payment to

(Testimony of Edgar M. Cohn.)

him of $30.00 for each single-family unit, is that right? A. Yes.

Q. This had to do only with single-family homes? A. Yes.

Mr. Conroy: I would like to introduce that, if the Court please.

Mr. Chehock: No objection.

The Court: Received in evidence as Exhibit No. 21.

(The document above referred to was received in evidence and marked Petitioners' Exhibit No. 21.)

PETITIONERS' EXHIBIT No. 21

Security Construction Company
Developers of Beautiful Glenwood
7801 Glen Oaks Boulevard
Burbank, California
STanley 7-3536

October 4, 1942.

Mr. George W. Cochrane,
708 W. 76th Street,
Los Angeles, California.

Dear Mr. Cochrane,

We will pay you a commission of $30.00 payable when complete down payment is paid and the sale approved by us on each house in Tract 13172 sold during the life of this agreement. This agreement

(Testimony of Edgar M. Cohn.)

may be terminated at any time by either of us in writing.

SECURITY CONSTRUCTION COMPANY,

By /s/ DANIEL COHN.

Accepted:

/s/ GEORGE W. COCHRANE,
George W. Cochrane.

Admitted in evidence December 5, 1951.

Q. (By Mr. Conroy): Do you know Edgar T. Burdette? A. Yes.

Q. Did you have any arrangement with him for the selling [52] of homes in Tract 13172?

A. Yes.

Q. Was that arrangement in writing?

A. Yes.

Q. Did you agree to pay him any particular amount? A. Yes.

Q. How much? A. $30.00.

Q. Who sold the houses in Tract 13172?

A. Edgar T. Burdette and myself and Daniel E. Cohn.

Q. With reference to Edgar T. Burdette, do you know how much time he spent in selling those houses? A. All of the time.

Q. All day long? A. And some evenings.

(Testimony of Edgar M. Cohn.)

Q. With reference to Eddy D. Field and the brokers who sold the multiple houses, what time did they spend on it, if you know?

A. I don't know. I did not supervise their activities.

Mr. Chehock: Pardon me. While we are on the subject, did I understand that Mr. Cochrane didn't sell any of them?

Mr. Conroy: I will ask him that question.

Q. (By Mr. Conroy): Did Mr. Cochrane sell any of the houses? [53]

A. No. Is that in Tract 13172?

Q. Yes. He didn't sell any of them?

A. No.

Q. Mr. Burdette sold them all? A. Yes.

Q. Did you have a written agreement to pay any fees to Mr. Burdette? A. Yes.

Mr. Conroy: If you would like, I will put that in evidence.

Mr. Chehock: I don't think that it is material. That is the written authorization?

Mr. Conroy: Yes. It is dated January 15, 1943. I will offer that as Petitioners' next in order.

The Court: It is received in evidence, without objection, as Petitioners' Exhibit No. 22.

(The document above referred to was received in evidence and marked Petitioners' Exhibit No. 22.)

(Testimony of Edgar M. Cohn.)

PETITIONERS' EXHIBIT No. 22

Los Angeles Cal.
Jan. 15,1943.

Security Construction Co.,

Gentlemen:

This will authorize you to pay to Mr. E. T. Burdette direct, any commission due me on our contract.

I am,

Very truly,

/s/ G. W. COCHRANE.

Admitted in evidence December 5, 1951.

Q. (By Mr. Conroy): Now, on Tract 13172, which was the 130 houses that you sold, did you handle those in the same fashion that you did the 109 single-family homes that you have just testified that were sold in Tract 13171? A. Yes.

Q. Did the partnership pay the advertising [54] expense?

A. The partnership paid all the advertising expense and the expense of furnishing a model home.

Q. Were you in touch with your brother, Daniel Cohn, while he was overseas? A. Yes.

Q. You have testified concerning a change in

(Testimony of Edgar M. Cohn.)

plans in regard to selling those houses and holding them for investment in December, 1943. Did you communicate with your brother, Daniel Cohn, concerning that matter? A. Yes.

Q. Did he object to that? A. No.

Q. Did he agree that it could be held as investment property? A. Yes.

Q. Was he in this country at that time?

A. That was in 1943. Yes.

Q. Where was your brother in December, 1944?

A. In India.

Mr. Conroy: Counsel, we have stipulated concerning the Pasadena properties and I don't believe I will take the Court's time to go into that. You may, if you want to, on cross-examination, and I will not object on the grounds that it has not been gone into on direct examination.

Mr. Chehock: Very fine. [55]

Mr. Conroy: You may cross-examine.

Mr. Chehock: Do you wish me to proceed?

The Court: I want to look at the stipulation. You are now referring to Paragraph 10, relating to some construction in Pasadena. That is something apart from the construction in these three tracts located over by Burbank.

Mr. Chehock: Yes.

The Court: All right. We can take a recess for a few minutes for the reporter, and we are going to stop today at about 4:30. Do you want any of the witnesses here to remain? Anyone that you wish to excuse will be agreeable with me and you

(Testimony of Edgar M. Cohn.)

may excuse them, unless you thought you were going to finish today.

Mr. Conroy: We can't finish today, but I would like to have the indulgence of the Court. We have Mr. Hollingsworth, vice-president of the Glendale Federal Savings & Loan Association. He is a very busy man and I would like to call him out of order if it is possible.

The Court: If Mr. Chehock could possibly postpone his cross-examination, it would be perfectly clear in the record.

Mr. Chehock: I have no objection, your Honor. They have been very cooperative and I am willing to be cooperative.

The Court: We will take a short recess.

Mr. Chehock: I am wondering if in the [56] record the reporter could put the witness in order following the cross-examination.

The Court: No, I don't care to do that. The reporter makes an index of the transcript and the index will show what page the cross-examination comes along.

(Short recess taken.)

The Court: You may proceed, Mr. Conroy.

(Witness temporarily excused.)

Mr. Conroy: I will call Mr. Hollingsworth.

Whereupon,

RADCLIFFE HOLLINGSWORTH

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated, and state your name and address for the record.

The Witness: Radcliffe Hollingsworth, R-a-d-c-l-i-f-f-e H-o-l-l-i-n-g-s-w-o-r-t-h.

The Clerk: And your address?

The Witness: 15503 Sunset Boulevard, Pacific Palisades.

Direct Examination

By Mr. Conroy:

Q. What is your business?

A. Vice-president of the Glendale Federal Savings & [57] Loan Association.

Q. How long have you been connected with that company?

A. Since its inception, for 17 years.

Q. Is that company located in Glendale, California? A. Yes.

Q. Mr. Hollingsworth, I show you Petitioners' Exhibit No. 13, and ask you whether that was made up under your supervision. A. It was.

Q. Did you check all the items? A. Yes.

Q. With the original records in your company?

A. With the original records.

Q. And you found it to be correct?

A. It is correct.

Q. Mr. Hollingsworth, with reference to loaning money to the Security Construction Company, I

(Testimony of Radcliffe Hollingsworth.)

understand your company did make loans for the construction of multiple houses in Tracts 13171 and 13170. A. We did.

Q. In the City of Los Angeles?

A. We did.

Q. And would your company have made a loan on all of the 69 multiple houses in those two tracts?

A. No. [58]

Q. As one loan? A. No.

Q. What are your requirements?

A. Under Section 6, the Rules and Regulations of the Government, lending institutions of our type at that time, particularly, were not allowed to loan money on construction of housing in excess of four units to one house; otherwise, it became business property and the amount of the loan would be reduced materially.

Q. Mr. Hollingsworth, did you ever discuss with Mr. Edgar Cohn and his father, Max Cohn, in the year 1943, the question of holding the multiple houses in those tracts for investment purposes?

A. Subsequent to the application for the priorities, which of course was out of our hands—the priorities had to be obtained by the contractors themselves. Once having received the priorities, they were in a position to request commitments from the Federal Housing Administration for the purposes of building the structures involved.

At the very inception it was my advice that, through the medium of depreciation, it would be possible to build up an estate through the utilization

(Testimony of Radcliffe Hollingsworth.)

of that non-taxable income derived. At that particular time I made figures and calculations predicated on the depreciation that was allowable, and that proved conclusively that by the utilization of that [59] method, they would ultimately own the property free and clear, paid with nontaxable income.

Q. Did you advise them to hold it?

A. I did.

Q. When was that?

A. In 1943. It was prior to the recording of those instruments. I don't remember the dates now.

Q. Did you have more than one conversation with Mr. Edgar Cohn and his father concerning the subject?

A. I had many conversations with them.

Q. Did the time come in 1943 when they discussed with you that subject and stated they were going to hold them?

A. Ultimately, they came to the conclusion that that was the process to follow.

Q. Did they tell you that?

A. They told me that.

Q. When?

A. That is when the buildings were in the course of construction. I don't remember the date.

Q. You wouldn't remember the date or the year?

A. No. No buildings were completed at that time.

Mr. Conroy: You may cross-examine.

(Testimony of Radcliffe Hollingsworth.)

Cross-Examination

By Mr. Chehock:

Q. Mr. Hollingsworth, did your bank handle the loans [60] on the original 130 houses built in Tract 13172? A. Yes, we did.

Q. Were those loans the same type of loans as were later made for these Tracts 13170 and 13171?

A. They are all Title VI loans.

Q. Do you mean Title VI under the Federal Housing Administration? A. Under 60-3.

Q. Just explain what kind of a loan that is.

A. That loan is made on individual pieces of property. Prior to Title VI entering into the picture, the contractor could not borrow the money in his own name and have the loan insured. But Title VI allowed for the insurance of that loan by the Federal Housing Administration, and under the circumstances, the borrower could obtain a greater amount of money for the purpose of producing houses, which at that time was considered essential. It was war housing.

Q. Then, do I understand that the construction of each of those houses, that is, the single-unit houses, as well as the multiple houses, were financed by individual loans?

A. Individual loans in each case.

Q. From the Glendale Federal Savings & Loan Association to the partnership under Title VI——

A. Right.

(Testimony of Radcliffe Hollingsworth.)

Q. ——of the National Housing Agency, which authorized [61] the Federal Housing Administration to expedite defense housing by the guarantee of loans made by private lending institutions on such properties upon their completion. Is that correct? A. That is correct.

Q. Now, as a condition to the making of all these loans, not only the single unit houses, but all the multiple houses, did the bank require the partnership to personally guarantee each loan until the construction was completed?

A. The Federal Housing Administration personally guaranteed it and we required that the financial structure be adequate and sufficient to justify the extension of credit and the risk which was entered into by us as a lender. That financial structure seemed to us to be adequate.

Q. Did the bank require the partnership to personally guarantee the loan until the construction was completed? A. No.

Q. Now, regarding this conversation you had, to whom did you talk?

A. I talked to Dan, Edgar and Max. Dan subsequently went into the Service, but subsequent to his going into the Service, I constantly talked to Max and Edgar as they were on the tract and I would drop over there a couple of times a week.

Q. In your conversations with them regarding whether they should hold this for investment or for sale, was the [62] matter of tax saving mentioned?

A. In connection with the whole transaction was

(Testimony of Radcliffe Hollingsworth.)

the utilization of depreciation for the purpose of building up an estate. Tax saving entered into the picture.

Q. I don't think you understood the question. Was tax saving mentioned at the time of the conversation as one of the reasons for your suggesting that they hold them as investment property?

A. Yes.

Q. Do you remember what your conversation was to them about what the tax saving might be?

A. The calculation I made gave evidence of the fact that by following the procedure which I had outlined, that by that process they would liquidate their entire obligation with tax-free money and build up an estate by virtue of so utilizing that procedure.

Q. You say by liquidating their assets. Do you mean they could later sell them?

A. They could hold them forever, but they could do the amortization through the medium of depreciation and apply it against the obligation and ultimately pay off the entire transaction and build for them an estate.

Q. Was there some mention that they be held over as a long-term capital gain?

A. The whole idea was to build an estate. [63]

Q. Was there any conversation at all that they might later want to sell them? A. No.

Q. Isn't it true that these multiple houses were originally built to sell?

A. Not to my knowledge. They were built to

(Testimony of Radcliffe Hollingsworth.)

rent or sell. They had to rent them at that particular time. Due to the fact that they had to rent them, I suggested that they continue to rent them.

Q. Was there any suggestion made to them as to how long they should rent them?

A. No. My suggestion was to go ahead and to build the houses and to rent them until such time as the savings and depreciation could pay the whole thing off and leave the property free and clear. At that time it would be subject to taxation.

Q. How could you recover the cost of the land from depreciation?

A. Through appreciation as well as depreciation. You take the depreciation that was allowed at that time, which was somewhere around four per cent and went up as high as six per cent. Through the medium of amortization the amount received in rent was profit. The difference in the amount of depreciation which one could take on housing of that type, which went up to six per cent, we deducted from the income [64] which negated the possibility of paying taxes on income actually derived.

Therefore, the income actually derived over and above the amortization was applied against the ownership of the property, and ultimate ownership of the property materialized.

Mr. Chehock: That is all.

Mr. Conroy: I have a couple of questions.

(Testimony of Radcliffe Hollingsworth.)

Redirect Examination

By Mr. Conroy:

Q. I don't know if I misunderstood, but I believe counsel quoted you as saying, "liquidating their assets." Do you mean liquidating the obligations? A. Liquidating the obligations.

Q. You said the partnership was not liable on those notes that it signed to you?

A. They are always liable, but they give us no personal guarantee.

Q. What do you mean by "personal guarantee"?

A. When a partnership is involved the only guarantee is that asset which we accept as being satisfactory as to their ability to carry through the transaction without running into difficulty.

Q. If you had to take the property, you would have to look to the property? [65]

A. Certainly.

Q. Did they sign the usual form of promissory note? A. Yes.

Q. Was there anything said on the note or trust deed that there was no personal guarantee?

A. Not to my knowledge.

Mr. Conroy: That is all.

(Testimony of Radcliffe Hollingsworth.)

Recross-Examination

By Mr. Chehock:

Q. If the assets were not sufficient——

A. They had a financial stability which reflected responsibility in excess of the assets involved.

Q. Then they are also generally liable?

A. Well, you could call it personally liable. They are always personally liable up to the personal amount of the assets of the co-partnership.

Q. Then they are also generally liable?

A. They are liable to the full extent of the liability, whether it is a liability to the partnership or——

Mr. Conroy: I will so stipulate.

The Witness: We knew the financial structure of them, individually as well as collectively.

Mr. Chehock: That is all.

Mr. Conroy: No further questions. May this witness be excused? [66]

The Court: Yes, certainly. I am sorry you had to wait.

(Witness excused.)

The Court: We will resume with Mr. Cohn's testimony.

Whereupon,

EDGAR M. COHN

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Chehock:

Q. When were you born?

A. December 21, 1911.

Q. When was your brother, Daniel, born?

A. March 23, 1915.

Q. Where were you raised?

A. In Chicago, Illinois.

Q. When did you move to California?

A. 1931.

Q. That was here in Los Angeles?

A. Los Angeles.

Q. What was the occupation of your father?

A. Retired.

Q. What was his occupation during the time he was active? [67]

A. Furniture manufacturer, cigar manufacturer, and builder.

Q. When you say "builder," what do you mean by that?

A. He built stores and theaters in Chicago.

Q. For sale? Did he build them and sell them, or what did he do?

A. He built them and sold them.

Q. How old were you when you started in business? A. I was 28.

(Testimony of Edgar M. Cohn.)

Q. That would be about what year?

A. 1941.

Q. Had you been in the building business prior to that time? A. Never

Q. What happened in 1941 that put you in the building business?

A. My brother and myself weren't doing much of anything, and my father decided that he had better give us a push and get us started in the right direction, for which we are very thankful.

Q. Just what did your father do?

A. He loaned us money to go into the building business.

Q. Well, did you start up as a corporation or a partnership?

A. We started up as a corporation. [68]

Q. What was the name of the corporation?

A. Security Construction Co., Inc.

Q. That started in what year? A. 1941.

Q. Is it still in existence? A. Yes.

Q. What did you do in 1941 through the corporation in the way of building and selling houses?

A. We built and sold 66 single-family houses adjacent to Tract 13172, on the other side of the street.

Q. In 1941?

A. In 1941, and completed some of them in 1942.

Q. They were sold immediately?

A. They were sold immediately upon completion.

Q. What tract number was that?

A. 12648, City of Los Angeles.

Q. Who owned that tract?

(Testimony of Edgar M. Cohn.)

A. The Security Construction Company, Inc.

Q. From whom did the corporation acquire it?

A. From John Biby as trustee for the sellers.

Q. It wasn't land formerly owned by your father? A. Oh, no.

Q. Who were the stockholders of the corporation?

A. Max M. Cohn, Daniel E. Cohn and Edgar M. Cohn.

Q. What was the approximate stockholder ownership? [69]

A. I don't recall. I would say it was approximately—I think I have it now. My father had the controlling interest, if I remember correctly.

Q. Then did you boys own an equal interest?

A. We owned an equal interest, I am sure of that.

Q. Has the corporation been in the business of buying and selling houses since 1941?

A. Yes. Pardon me. Could I have that question again?

The Court: Will the reporter please read the question?

(The question was read.)

The Witness: We never bought houses. We built them and sold them.

Q. (By Mr. Chehock): I meant to say build and sell. What did the corporation do? Did they buy unimproved property in 1941? A. Yes.

Q. Did they proceed to subdivide it?

(Testimony of Edgar M. Cohn.)

A. Yes.

Q. And build the houses and sell the houses?

A. Yes.

Q. Then in May, 1942, was that the time the partnership started? A. Yes.

Q. What was the occasion for starting the partnership? [70]

A. The fact that my father decided he did not want to be active any more with us, since he had given us a good start, and we were to be on our own.

In 1941, through the Security Construction Co., Inc., he started us in the building business, and he was through. He didn't want to incur any liabilities and didn't want to become involved in business because his health was poor.

Q. When did your father die?

A. November, 1945.

Q. And did you boys acquire his interest in the corporation? A. Yes.

Q. Back in 1942, then, this first tract that you acquired was Tract No. 13172?

A. That is right.

Q. Did you buy that or was it given to you?

A. It was given to us.

Q. Did you buy the acreage as subdivided property?

A. We didn't buy it. We were given the gift as subdivided property.

Q. I believe, Edgar, the deed shows that you

(Testimony of Edgar M. Cohn.)

received it by metes and bounds and it was subdivided after that.

A. The map was recorded when the deed was recorded.

Mr. Conroy: Those are the two deeds there. [71]

Q. (By Mr. Chehock): Where is the recording date? A. Here.

Q. Where is Tract No. 13172? A. Here.

Q. You acquired this Tract 13172 in May of 1942?

A. No. The partnership was formed in May of 1942.

Q. The deed to this property was dated May 25, 1925; is that right? A. Yes.

Q. And the partnership thereafter did the work of getting the property ready for subdivision and had it subdivided on August 26, 1942?

A. That is correct.

Q. In other words, the partnership did not acquire it as subdivided property?

A. They acquired it as metes and bounds, but the deeds were not recorded until this date, August 26, 1942.

Q. When you say that a piece of property is subdivided, that means when it is actually recorded?

A. When the map goes of record.

Q. But the actual work of drawing it up and subdividing it and getting the required maps, that was done by the partnership, is that right?

A. That is correct. I was too technical there, Mr. [72] Chehock.

(Testimony of Edgar M. Cohn.)

Q. Now, this first tract, 13172, I believe your testimony was that some one hundred and thirty houses, single family, were built; 21 in 1942 and 109 in 1943. A. 21 sold in 1942.

Q. And 109 in 1943?

A. Construction started on the entire group in late '42.

Q. Who sold these houses?

A. Edgar T. Burdette.

Q. Burdette was a licensed real estate broker?

A. Not at that time.

Q. How did he sell them?

A. He used Mr. George Cochrane's license.

Q. And George Cochrane was a licensed broker?

A. Yes.

Q. Did the partnership withhold tax for either Cochrane or Burdette as an employee?

A. To the best of my knowledge, no.

Q. Was Social Security paid for either Cochrane or Burdette by the partnership?

A. Not to the best of my knowledge, no.

Q. These 130 houses were sold immediately after construction, isn't that right? A. Yes.

Q. Then, in the summer of 1943, as I understand it, [73] you made application with the Federal Housing Administration for priority for more houses, and you had in mind at that time single houses? A. Yes.

Q. What did the Federal Housing Administration tell you?

A. They told us in order to construct any hous-

(Testimony of Edgar M. Cohn.)

ing on the property we owned, that we would have to build multiple houses, more than one unit to a building.

Q. When did you decide that you were going to also build houses on Tract 13171?

A. In December of 1943.

Q. This Tract 13170 was actually deeded to you in September, 1943, isn't that right? A. Yes.

Q. In making application for priorities with the Federal Housing Administration in the summer of 1943, did you have to prepare maps and descriptions of the property that you wanted the priorities for? A. Yes.

Q. Who owned the Tract 13170 in the summer of '43? A. Max M. Cohn.

Q. That is your father? A. Yes.

Q. Did you have an understanding with him at that time [74] that you could have the land if you got the application approved? A. Yes.

Q. And who did the work, then, of getting the maps ready and all the work required for the subdivision of the Tract 13170? A. Max M. Cohn.

Q. Didn't you boys actually do the work? You made application for priorities on the assumption that you would get it, didn't you?

A. We made application for the priorities for the buildings.

Q. And at that time you had to present maps, didn't you, of the properties and where the houses would be built?

(Testimony of Edgar M. Cohn.)

A. Maps of the property were prepared by the engineer. Maps of the buildings on the property were prepared by an architect, another person.

Q. What I am getting at, while your father didn't deed it to you until September, 1943, the actual work, you saw that it was done for the subdivision.

A. My father employed an engineer and actually there wasn't much work to be done. We might have assisted him. It was only natural, being his sons.

Q. You knew you were to acquire the property if the priorities went through? [75] A. Yes.

Q. What work is there in getting ready for subdivision?

A. The first step is to hire a qualified engineer, registered civil engineer who will prepare a plot of the property, and application is then made to the city or municipality in which the property is located, for the purposes of subdivision.

Q. Who took care of that work?

A. The application was taken care of by the engineer.

Q. Did you do any of the work yourself?

A. I don't remember. I might have assisted.

Q. Your testimony was, I believe, that you acquired this additional tract in January, 1944. That would be Tract 13171, is that right? A. Yes.

Q. Who owned that tract prior to the time the partnership was acquired? A. Max Cohn.

Q. You made application for the priorities there the previous December, December, 1943?

(Testimony of Edgar M. Cohn.)

A. Yes.

Q. Did you have an understanding with your father that if the priorities would be granted, that you would get the property? A. Yes. [76]

Q. Did you purchase Tracts 13170 and 13171 from your father or did he give it to you?

A. We purchased it.

Q. I believe you said in December, 1943, you had some conversation—when did you have this discussion about this letter of January, 1944. What was the first step in that?

A. The first step in regard to the letter was in January, 1944, at Mr. Wood's office, when I informed him—at first I asked his advice as to the holding of the property for investment, and he informed me that I should write him a letter stating that fact.

Q. Now, by January, 1944, you had already made application for the building, not only of these 56 multiple houses made up of 158 units, but you also made application to build 109 single-family houses, plus 13 more four-unit multiple houses; is that right?

A. Yes. Our priorities on the last tract, 13171, was approved by the middle of December, 1943. We made application in September, 1943.

Q. By January, 1944, you knew that under the Federal Housing Administration requirement at that time that if you were to sell the 109 single-unit houses, that you would have to build the 69 apartment houses for rent; isn't that true?

(Testimony of Edgar M. Cohn.)

A. Yes.

Q. And so the matter of renting those houses was not [77] a matter of voluntary decision on your part; it was a matter of requirement under the National Housing Agency at that time, isn't that true?

A. That is right.

Q. As I understand it, you entered into one-year written leases, is that right? A. Yes.

Q. On the 69 apartment houses? A. Yes.

Q. Why did you enter into one-year written leases?

A. Because we were holding the properties for investment and would hold them indefinitely.

Q. Now, isn't it true, Edgar, that the reason you entered into written one-year leases was because the OPA required written one-year leases in order to have the first and last month's rent paid in advance?

A. I don't remember that point clearly. We just went on and signed the leases and collected the first and last month's rent. In fact, in January, 1945, we were called down to the OPA and ordered to return the deposits we had on the leases.

Q. Could you refresh your mind on that?

A. I believe the facts are that the OPA required the owner to collect the first month's and last month's rent in advance in order to keep the leases. [78]

Mr. Conroy: That is my understanding, but I would not want to stipulate to that, because my client might have acted in error. I think either one

(Testimony of Edgar M. Cohn.)

of us can determine that through the OPA or the Regulations. That was their idea of it. I will stipulate to that.

The Court: It was whose idea?

Mr. Conroy: Their idea was that they could not collect the first and last months' rent without having a written lease. They must have a written lease in order to collect the last month's rent as a security. Counsel asked me whether I would stipulate to that and I don't know if that is the law.

I will stipulate that my clients thought that was the law.

Q. (By Mr. Chehock): You testified that in December of 1944, you went into a huddle with several people to find out what to do with these 69 multiple houses.

A. With my father and Mr. Biby in December, 1944.

Q. And I believe that you testified that the reason that you decided at that time to put the 69 houses up for sale was the combination of several reasons. One is rumors of cessation of hostilities and that Lockheed would discharge perhaps all but ten per cent of its employees and there might be a vacancy factor of 50 per cent. Is that right? [79]

A. Yes.

Q. Did you consider those reasons good reasons for making the decision to sell? A. Yes.

Q. Now, Edgar, if those same facts had been present back in January, 1944, that were present

(Testimony of Edgar M. Cohn.)

in December, 1944—in other words, if there had been rumors of cessation of hostilities at that time and that Lockheed would discharge all but ten per cent and the apartment buildings would have a 50 per cent vacancy factor, would you have sold or rented the apartments?

Mr. Conroy: Just a second. We object to that on the grounds it is speculative.

The Court: Objection sustained.

Q. (By Mr. Chehock): In January, 1944, is it not true, Edgar, that you knew that sooner or later the very thing that did happen in December, 1944, was going to happen, or at least you had reasonable grounds to believe it would?

A. Not in the order in which it happened.

Q. At least you knew those events were probably coming?

A. Not immediately or even in the near future.

Q. Irrespective of when they might come, you knew they were coming in the future?

A. I didn't know. [80]

Q. I beg your pardon? A. I didn't know.

Q. Didn't you have reason to feel that when the cessation of hostilities would come about, that Lockheed would discharge most of its employees?

A. No.

Q. Why did you know that in December if you wouldn't have known it earlier?

A. There was talk of a civil aviation program after the cessation of hostilities and the building up

(Testimony of Edgar M. Cohn.)

of a peace-time industry in the Burbank area. We based our reasoning on that logic.

Q. When? A. In December, 1943.

Q. Well, this additional building would be a cause for there being a greater demand rather than a vacancy? A. In December of 1944, yes.

Q. I see. Now, the last of these 69 apartment houses, as I understand it, was completed on June 14, 1944, is that right? A. Yes.

Q. And then 6 months from that would be December 14, 1944? A. Yes.

Q. Now, this conversation and decision to sell was in [81] the last part of December, 1944, is that right? A. Yes.

Q. When you talked to Mr. Wood and others about this thing, was it mentioned that since six months had expired that you might report them as long-term capital gains? A. Yes.

Q. Who mentioned that to you?

A. Mr. Wood.

Q. Was that same thought expressed back in January of 1944, that you might rent them and if you retained them for as much as six months you perhaps could report them on long-term capital gains? A. I don't remember.

Q. Well, whether it was in the conversation or not, you knew what the law was on long-term and short-term capital gains? A. Yes.

Q. And that was one of the factors you considered in deciding to hold the property for investment?

(Testimony of Edgar M. Cohn.)

A. I don't quite understand the question, Mr. Chehock.

Q. Back in January, 1944, when you were trying to decide on whether to sell or hold these buildings, one of the factors that you considered as a reason for holding them for rent was that if they were eventually sold, that you could report them as long-term capital gains, if you kept them for [82] six months or more.

A. I don't remember that I discussed it at that time, but I was cognizant of the fact.

Q. That was one of the considerations in your mind? A. Not necessarily.

Q. Well, it may have been one of the factors you considered? A. I don't believe so.

Q. Who sold the 69 apartment houses?

A. There were three brokers.

Q. And the single houses, the 130 single houses and the 109 later were sold by whom?

A. The 109 single-family houses were sold by one broker, Edgar T. Burdette, who devoted his time exclusively to selling the buildings.

The 109 houses were sold from July to September in 1944 by James Hotaling, a licensed real estate broker, who devoted all of his time to selling these buildings.

Q. Did you withhold taxes from Mr. Hotaling's wages? A. No.

Q. Or Social Security?

A. To the best of my knowledge, we did not.

(Testimony of Edgar M. Cohn.)

Q. Who paid for the broker's license of Cochrane, Burdette and Hotaling?

A. I don't know. [83]

Q. Did you, the Security Construction Company, the partnership, pay for them? A. No.

Q. Where did these men operate from that you had selling your houses; out of what location?

A. Out of an office provided by us, and in the case of Mr. Burdette, from a model house furnished by us, one of the houses on the tract.

Q. Where was this building and this model house?

A. The building we used for business was on the corner of Glenoaks Boulevard and Hollywood Way.

Q. Was it in one of the tracts?

A. No, it was on unsubdivided land owned by my father. It was at the very corner. If I may point it out on the map——

Q. Will you point it out on the map?

A. Right here was our office and we had a model home, I would say—here was our office and we had a furnished model house at various locations. As we completed the house we would sell it and we would move the furniture to another house.

Q. Is it correct that the business office that the partnership had was adjacent to Lot 39 in Tract 13170? A. Yes.

Q. What kind of a building was it?

A. It wasn't much of a building. It was a frame and [84] wood-singled roof building.

(Testimony of Edgar M. Cohn.)

Q. When was it built?

A. We had two buildings. When these two were built, I couldn't tell you.

Q. You bought them?

A. We purchased them.

Q. When did you buy them?

A. We bought the first building in 1941 and the second building in 1942.

Q. Were they adjacent to each other?

A. Yes.

Q. Did they have any heading on them?

A. Yes. One office had two billboards, one on either side, stating the name of our company, our address, phone number, and so forth, that we had houses to sell. Besides that, we put up directional signs and road signs on Hollywood Way and Glenoaks Boulevard for a distance of several miles.

Q. How long were the business houses used by the partnership?

A. They were used until 1946.

Q. Was there a central office for Cochrane and Burdette and Hotaling? A. Yes.

Q. And did you have an office there, too?

A. Yes. [85]

Q. Was there anybody else who had an office there?

A. Later we rented one building to Eddy D. Field for a real estate office.

Q. Now, when these 109 houses in Tract 13172 and the 109 houses in Tract 13171 were sold, as I

(Testimony of Edgar M. Cohn.)

get, Burdette and Hotaling did the selling; is that right? A. Yes.

Q. How did you go about selling them?

A. The Security Construction Company put up directional and advertising signs, advertising the fact that those houses were for sale. The property was located in Los Angeles in the vicinity of Burbank. We were just outside of the Burbank city limits.

The Security Construction Company advertised in newspapers, in the Valley Times, and, if I remember correctly, I believe in the metropolitan dailies.

Q. There were also two duplexes and 14 single houses built in Pasadena in the fall of 1945 and the early part of '46, that were sold? A. Yes.

Q. Who sold those?

A. Those were sold by various brokers in Pasadena, local brokers.

Q. Under what terms did you employ them?

A. They were a broker acting on their own behalf, and [86] we employed them to sell our houses and we paid them a commission.

Q. Were they given a net figure that they had to give the partnership and they could have anything above that?

A. No. We gave them a schedule of our sales price and the commission that we would pay them.

Q. Who advertised those for sale?

A. We advertised—strike that. I want to start again, if I may. Conditions were such in early 1946

(Testimony of Edgar M. Cohn.)

that it was not necessary to advertise to sell houses.

Q. Did the broker advertise?

A. Not to my knowledge. If they did, they did it on their own volition.

Q. Do you know whether they did or didn't?

A. I don't remember.

The Court: Is it your testimony that the brokers who were handling the Pasadena houses may have advertised, but with respect to the Pasadena houses the partnership did not advertise?

The Witness: I don't recall if we advertised, your Honor, because of the situation at that time of the housing shortage and the fact they were readily salable.

The Court: That isn't a very clear answer. Would your answer be you do not remember whether you advertised the Pasadena houses for sale? [87]

The Witness: Yes.

Q. (By Mr. Chehock): Would you have evidence here that would clear that point up later?

A. I can get it from the books.

Q. Why did you pay a commission for the sale of those houses in '46 if they were so easily sold?

A. Because I was unable to sell them myself. When I say they were readily salable, I meant by real estate brokers.

The Court: Why were you unable to sell them yourself?

The Witness: Because I was engaged in the construction of these buildings, supervising the con-

(Testimony of Edgar M. Cohn.)

struction, and searching for more development; conducting the business.

The Court: Was it because you didn't have a broker's license?

The Witness: I did not have to have a broker's license, because everyone is permitted to sell their own property. I could have sold them if I had the time to stay there and sit on the job and sell them.

Q. (By Mr. Chehock): Now, coming to the 130 houses on Tract 13172, as I understand it, Burdette sold those? A. Yes. [88]

Q. He operated out of this central office?

A. Yes.

Q. You had an office in the same building?

A. No. There were two buildings, side by side; a small office and a large office.

Q. They were adjacent to each other?

A. Yes.

Q. Did you help Burdette to close sales, to close deals? A. Yes.

Q. What did you do to help?

A. I assisted in convincing the prospect he was making a good buy and that was the place for him to live. I assisted in signing the original deposit receipts and all the final contracts of sale.

Q. Did you assist Hotaling in selling the 109 houses?

A. Yes. In fact, I showed the houses myself.

Q. And in what way did you assist him?

A. I showed houses, as I said. I made a great many deals myself and still paid him a commission.

(Testimony of Edgar M. Cohn.)

Q. Did you assist the real estate brokers Eddy D. Field and Roy McKee to make sales of the 69 apartment buildings?

A. Only in the signing of documents.

Q. Didn't Field and yourself have offices either in the [89] same building or adjacent buildings?

A. Field had an office in the adjacent building, which I rented to him.

Q. Isn't it true, Edgar, that several times you assisted Mr. McKee in closing sales of these 69 apartments? A. No.

Q. Were there occasions when Mr. McKee introduced you to a prospect, with which he had not closed a deal, and you helped him to close the deal?

A. The first part of the question I can answer as "Yes." The second part, "No."

Q. Well, I don't understand your answer, then.

A. He did introduce prospects to me.

Q. Didn't you help him close some of the sales?

A. I didn't close any deals.

Q. I didn't ask you if you closed any deals. I asked you if you didn't help him.

A. Yes.

Q. In what way did you help him?

A. He would bring a prospect in once in a while in the office where we were conducting our building business, introduce me and talk about the houses. Naturally, I wasn't going to say anything disparaging about the houses that I wanted him to sell. And that was the end of it.

(Testimony of Edgar M. Cohn.)

Q. And then you, of course, went ahead with signing up all of the papers like you did on all of the houses? [90] A. Yes.

Q. The single and multiple, both? A. Yes.

Q. Can you tell me why this letter of January 12, 1944, refers only to the 56 buildings as being retained for investment rather than the 69?

A. Yes. We had not started construction on the 13 four-family buildings at that time. We had the priorities, but actual construction had not started.

Q. You knew you were going to build them?

A. Yes.

Q. As I understand the facts here, Edgar, these 56 multiple buildings were made up of 23 four-unit and 33 two-unit buildings, totaling 158 units; is that right? A. That is right.

Q. Then this law came about under which you could sell as much as one-third within 15 days after final inspection, provided you rented the other two-thirds; is that right? A. Yes.

Q. And by January you had already made your application on this new project, that is, on Tract 13171, in which you were going to build 109 single-family houses, plus 13 four-unit houses, which would make 161 units; is that right?

A. 161 units in all, that is right.

Q. In order to come under the Federal [91] Housing Administration regulations, you knew at that time that in order to sell the 109 single houses, you had to rent the 158 units or the 56 apartment houses, plus the 13 four-unit houses, which totaled

(Testimony of Edgar M. Cohn.)

approximately two-thirds of the project. Is that right? A. Yes.

Q. I notice, Edgar, in your 1942 partnership return, and in the other returns, right on up the line, and in your individual returns, you have stated your occupation as "real estate."

A. Well, in 1942 we were building real estate for sale.

Q. Well, was that what the word "real estate" meant on all your returns, your partnership returns for the various years and the individual returns?

A. I couldn't answer what it meant on the returns. They were filed by Boyle & Wood. They put "real estate" on them. Improving real estate at that time was our business.

Q. You sold 21 houses in 1942, 109 in 1943, 109 in 1944, and 69 multiple houses in 1945?

A. Yes.

Q. Is that right? A. That is correct.

Q. Now, in January, 1944, you knew that you were going to build these 109 single-family houses, build them in 1944, [92] didn't you? A. Yes.

Q. You also knew in January, 1944, that since you were going to sell the 109, that if you sold the 69 apartments, plus the 109, unless you went into some new project you would not have anything to sell in 1945; isn't that right?

A. Would you repeat the last part of that question, please?

Q. One of the reasons for the delay in the sale of the 69 apartment houses was the fact that you

(Testimony of Edgar M. Cohn.)

were going to sell 109 single houses in 1944, and that you would like to spread your sales?

A. No.

Q. From 1942, is it not true that from September, 1942, until November 1, 1945, you had built and sold 324 houses, made up of single houses and multiple houses?

A. Can I write the figures down and see if that 324 is correct?

Mr. Conroy: Counsel, you refer to them as houses. Do you mean houses or units?

Mr. Chehock: Houses.

The Witness: That is from 1942 to November 1, 1945.

Mr. Chehock: I think I am wrong on that. Until November 1, 1945, would be 16 houses less than that. It would be 308. [93]

The Witness: During that period, 239 single-family and 69 multiple dwellings, consisting of 33 doubles and 36 four-family units, were built.

Q. (By Mr. Chehock): So the 239 singles, plus the 69 apartment houses, makes 308 houses, either single or multiple, that you built and sold from September, 1942, until November 1, 1945; is that correct? A. Yes.

Q. None of those houses had been retained by you. They were all sold, were they not? There was no house in that entire time that you built that you retained to November 1, 1945; is that correct?

A. To the best of my knowledge, yes.

Q. After you sold the last of the 69 apartments

(Testimony of Edgar M. Cohn.)

in 1945, which I think were completed by October 31, 1945, at that time you had no houses that you were renting; is that right?

A. Yes, that is correct.

Q. Now, did Field, Cochrane, Burdette and Hotaling close their transactions in that business building there adjacent to these tracts?

A. I know that Hotaling and Burdette either closed the deals in the office of the building later rented or in the other offices of the Security Construction Company, [94] adjacent thereto. Where Field closed his deals, I do not know.

Q. Actually, McKee did most of the selling?

A. McKee was his salesman for Glendale and actually was on the tract most of the time.

Q. In 1945 no new houses were built by the partnership except the beginning of the two duplexes and 14 single houses in Pasadena?

A. That was the only start of construction by the partnership in 1945.

Q. And the 69 apartment houses here in controversy were all sold in 1945, isn't that right?

A. Yes.

Q. Was Daniel Cohn home then or was he in the Service?

A. Daniel returned in May, 1945. He returned to the United States. He was still in the Armed Forces.

Q. From May, 1945, and for the entire year 1945, since you weren't building houses——

(Testimony of Edgar M. Cohn.)

A. I was building houses.

Q. You didn't build any until the fall of 1945?

A. We started construction in August, late summer of 1945.

Q. Up to that point you had nothing to do except to aid in the sale of these houses?

A. No. [95]

Q. What else did you have to do?

A. Look for property, hunt for property in Pasadena.

Q. To do what?

A. To build houses in Pasadena.

Q. For what purpose? A. For sale.

Q. Did you find any new projects in 1945?

A. In late summer, 1945, the only building that could be—I believe it was in the spring of 1945, the only building that could be built would have to be built under priorities, and they were not issuing any priorities for the building of houses except those that had been programmed, which we came under in Pasadena. We could obtain a few more priorities if we found the property.

Mr. Chehock: I would just as soon take a break at this time, your Honor.

The Court: I think we will have to adjourn this trial now until 9:30 tomorrow morning. Before we do, I would like to say to counsel that I regret that I asked the Clerk yesterday to ask you to be here this morning at 9:30, but I will say that if the Court had not sat last night until 10:30, we would not have started the trial of your case today at all.

(Testimony of Edgar M. Cohn.)

Although you have lost some time from your office this morning, perhaps you have saved a little time in the end. I am sorry your witnesses also had to wait this morning, but [96] I think, Mr. Conroy, that you will agree that those things are quite usual in courts.

Mr. Conroy: They are.

The Court: It is very hard to keep the dates that have been set and we do have a calendar this time which has a number of cases having long trials, and probably all along we will find the time has not been estimated correctly.

Thank you very much. I will see you tomorrow morning at 9:30.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 9:30 o'clock a.m. Thursday, December 6, 1951.) [97]

December 6, 1951

The Court: Mr. Cohn, will you take the stand, again, please?

Whereupon,

EDGAR M. COHN

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: Mr. Chehock, will you go ahead with your cross-examination. I think we might agree to have the gentleman addressed as Mr. Cohn. That makes a little more formal procedure.

(Testimony of Edgar M. Cohn.)

Mr. Chehock: There is another Mr. Cohn and I wanted to distinguish between them. That is the only reason.

The Court: If you will refer to the other Mr. Cohn as Daniel Cohn, you will have no difficulty. The transcript shows at the beginning of the testimony the full name of the person that is testifying.

Cross-Examination
(Continued)

By Mr. Chehock:

Q. Mr. Edgar Cohn——

The Court: Just call him Mr. Cohn. We know the witness is Mr. Edgar Cohn and you can refer to him from now on as Mr. Cohn. If you are going to refer to some other Mr. Cohn, other than the person who is testifying, you can refer [100] to him as Mr. Daniel Cohn. This is Mr. Edgar Cohn. I have never heard any witness in court referred to by his first name. Go ahead.

Q. (By Mr. Chehock): Referring to the 21 sales that were made in 1942, the 21 houses, can you state when they were built and completed and when they were sold?

A. Yes, in 1942, in September, we started construction and completed the houses before the end of 1942. The sales were made in October, November and December, to the best of my knowledge and recollection.

Mr. Conroy: You are now inquiring about sales

(Testimony of Edgar M. Cohn.)

made by the corporation, the Security Construction Co., Inc., is that right?

Mr. Chehock: No, not the corporation.

Mr. Conroy: I am sorry, I was mistaken one year.

Q. (By Mr. Chehock): The 21 houses that you have just testified about were a part of the 130 house project, is that right? A. That is right.

Q. Built on Tract 13172? A. Right.

Q. Now, when were the houses built and completed that were sold in 1943?

A. The entire project of 130 houses was [101] begun in September, 1942, and completed in April or May, 1943, approximately.

Actually, the sale is not a sale until it is closed and the 109 sales were closed in 1943 when the buildings were completed.

Q. So the 109 were completed about when?

A. From January 1st to April, 1943, and sold then.

Q. And when were they sold?

A. They were sold from January to April.

Q. Immediately after completion?

A. Immediately after or prior to completion.

Q. Was it Mr. Burdette who sold these?

A. Yes, with my assistance.

Q. And the agreement there was that the seller, Cochrane or Burdette, were to get $30.00 a house for each house sold whether it was sold by——

A. Burdette, Cochrane or myself.

(Testimony of Edgar M. Cohn.)

Q. And Cochrane was a licensed real estate broker?

A. Originally, yes. Burdette was operating under his license.

Q. Was he the Cochrane or Burdette employed by the partnership prior to the agreement made to him to sell these houses? A. No.

Q. Were they employed by the partnership after the 130 houses were sold? [102] A. No.

Q. Now, coming to the years 1944, when were these 109 single houses built and when were they sold?

A. Construction started immediately after the 13 multiple buildings. That was our order of construction, and I would estimate construction began in March, 1944, and finished in September of 1944. Sales began in July of 1944 and the entire group was sold by September, 1944.

Q. Was there a great demand for houses at that time? A. Yes.

Q. Why did you hire anybody to sell them for you?

A. Because I was supervising the construction of all of the buildings and also attempted to sell them and found the job too much for me.

I want to qualify a statement just made. In real estate they don't just walk up and hit you over the head and take them away from you. They still have to be sold. It is not like going to the grocery store and saying, "I want a pack of Lucky Strike cigarettes."

(Testimony of Edgar M. Cohn.)

Q. You didn't want to bother with the work of selling?

A. Oh, no, I wanted to bother with the work of selling. When I say they are easily sold, I mean they can be sold with diligent effort in a period of one to two months. There was a great deal of inquiry and a great deal of activity and that is reflected in the frequency of the sales you make in selling [103] those houses.

Q. Hotaling is the one you made the deal with there? A. Yes.

Q. He was to receive $60.00 per house?

A. Yes.

Q. And was Hotaling employed by the partnership prior to the time you made that arrangement with him to sell these houses? A. No.

Q. Was he employed by the partnership after the 109 houses were sold? A. No.

Q. He was an independent licensed real estate broker? A. That is right.

Q. Was there a greater demand for houses in '44 or in '45 for either sale or rent?

A. I can't answer that question because I did not have any single family houses for sale in 1945.

Q. Take your apartment houses in 1944 and '45. Was there a greater demand for apartment houses in 1944 or '45?

A. I wouldn't know because I didn't intend to sell any partment houses in 1944 or afterwards.

Q. Don't you recall what the housing situation was there, whether people wanted houses to buy, or

(Testimony of Edgar M. Cohn.)

was there a greater demand for them for rent? What do you recall about [104] that?

A. It would vary from time to time, the same as the stock market would vary. There would be a demand and there wouldn't be, and we were only interested in our own merchandise, our own buildings.

Q. Coming to the year 1945, the year in which these 69 apartment houses were sold, you first had some sales by some independent broker before Eddy D. Field came into the picture?

A. I had some sales by two other brokers.

Q. Then why did you make any deal with Field?

A. Because Field came to me and told me he could sell the buildings in a hurry.

Q. And were you anxious to sell them in a hurry?

A. Yes, based on the reason that the pending layoffs at Lockheed, we felt the sooner we sold the buildings the better it would be for us.

Q. Actually—are you through? A. Yes.

Q. Actually, didn't your father contact Field rather than Field coming to you?

A. He might have. When I say that Field came to me, Field, actually, kept after me and after me. I didn't approach Field, but he got on me and he was a supersalesman and he sold me on himself that he was the man who could move these buildings in the shortest possible time. [105]

Q. Was it McKee or Field who sold himself to you folks as the one to be hired to do the job?

(Testimony of Edgar M. Cohn.)

A. As I recall, it was Roy McKee. We were very favorably impressed with him, but he was powerless to make a deal with us since Field was the broker and all of our dealings had to be through Field.

Q. Did either Field or McKee work for the partnership prior to this arrangement with them to sell the houses in 1945? A. No.

Q. Did either Field or McKee work for the partnership after the 69 apartment houses were sold?

A. No.

Q. In the effort to sell these apartment houses in 1945, didn't McKee spend full time at the tract in doing it?

A. I don't remember if he devoted his entire time at the tract or not. I knew he was manager of the Glendale office and he was required to spend a portion of his time there.

Q. Didn't you have an office right there with his?

A. Our business office, our construction office was next to the Eddy D. Field office, his rental office, Branch No. 3, as I recall it. The other office I am referring to is Mr. Field's Glendale office.

Q. I hand you Exhibit 6, Mr. Cohn, and ask you if you can describe, to the satisfaction of the record and the Court, where this office of yours was located and where the office [106] was located that was used by these real estate agents.

A. Yes. Our office was a structure about 10 by 22, of wooden construction located approximately

(Testimony of Edgar M. Cohn.)

100 feet—we will call this north. If we say this is north——

Q. You mean to the right?

A. We will call this north, to the right. Actually, it is northeast. We will call it northeast. It is south of Glen Oaks Boulevard.

Field's office was located approximately 50 or 60 feet south of Glen Oaks Boulevard and was an office approximately 8 by 12 of wooden construction.

The Court: May I suggest that you take the Court's copy of Exhibit 6 and draw with pencil a circle around the point indicating the locations, rather than try to locate it verbally.

Q. (By Mr. Chehock): Now, Mr. Cohn, you have drawn on Exhibit 6 a circle where the Security Construction Company office was located and written the words "Security Construction Company office," is that correct? A. Yes.

Q. And the circle is in black ink that you have drawn, is that right?

A. And I am going to add "Eddy D. Field office." This is at the time of the multiple buildings sale. [107]

Q. Mr. Cohn, just to get another picture of it, could you mark on here, Exhibit 5, approximately where the office had been?

A. Yes. Could I borrow your red pencil, Mr. Baird? Thank you.

Mr. Conroy: May I suggest that you draw an arrow out to that point. It is difficult to see.

Q. (By Mr. Chehock): That was the business

The Witness: No, they were separate [108] buildings.

The Court: They were separate buildings, they were not under the same roof?

The Witness: They were not under the same roof.

The Court: You walked out of your door and walked into theirs?

The Witness: A matter of 10 or fifteen feet.

The Court: But they were very close together?

The Witness: Yes.

Q. (By Mr. Chehock): What percentage of the time did you spend at the office in 1945?

A. I was in the office in 1945 about 35 per cent of the time.

(Testimony of Edgar M. Cohn.)

office, as I understand it, Mr. Cohn, that was used by the partnership, by Burdette, by Hotaling and by Field?

A. That is correct. Are you referring to the 20 by 12 house?

Q. Are there two offices there?

A. There were two offices there.

Q. Just tell what the facts are on the question I asked.

A. The operations of Field, Burdette and Hotaling were from the same office.

Q. Was your office in there also? A. No.

Q. Where was your office?

A. My office was located immediately adjacent to the office used by Field in 1945.

The Court: Was there a connecting door?

(Testimony of Edgar M. Cohn.)

Q. What did you do with the other 65 per cent?

A. Looking for land, lots. By land I mean unsubdivided property and by lots, subdivided property. And preparing and constructing 16 buildings in Pasadena.

Q. What did you intend to do with the unimproved property that you were looking for?

A. To develop that property and build houses.

Q. For what purpose?

A. For the purposes—I was looking for lots suitable to build single family houses for sale to buyers.

Q. The last priority you received from the Federal Housing Administration was in the early part of 1944, isn't [109] that right? A. No.

Q. Just what are the facts on that?

A. The last priority the company received was to construct the 16 buildings in Pasadena for persons of minority races.

Q. When did you receive the one in Pasadena?

A. I don't remember the exact date. It might have been the early part of 1945 or the late part of 1944.

Q. You didn't start construction until the fall of 1945? A. Until August of 1945.

Q. Weren't you required to build within a certain length of time after you got your priority?

A. You were required to start within 60 days. However, if you could not start construction because of title difficulties or because of difficulties in obtaining materials, or for some other good and

(Testimony of Edgar M. Cohn.)

valid reason, then the priorities would be extended.

Q. None of the real estate brokers that you have employed, or that the partnership employed from 1942 through 1946 were ever hired before the partnership or after, but only for the particular dealing in selling the particular houses?

A. That is right. I can't answer the last part of the question. I don't understand it well enough in order [110] to give you a clear answer.

The Court: Will you please read the question?

(The question was read.)

The Witness: Yes. They were hired for the houses which they sold.

Q. (By Mr. Chehock): Then, the practice of the partnership from 1942 to '46, inclusive, was to build houses on newly developed properties and employ licensed real estate brokers to sell them for you for so much a house or for a certain net to the partnership rather than for the partnership to try to sell them themselves, is that right?

A. The answer is with the single family houses, the 130 in Tract 13172 and the 109 in Tract 13171, I devoted my time in conjunction with the broker and worked on the tract with him in actively selling the houses.

On Tract 13170 and with the 13 buildings on Tract 13172, the brokers sold those houses and did not receive any help from me in selling them.

Q. Well, now, I believe, Mr. Cohn, that your

(Testimony of Edgar M. Cohn.)

testimony yesterday was that there were occasions where you did assist, is that not true?

A. I did assist in this respect: That when Mr. McKee would bring a buyer in my office and say, "I want you to meet Mr. Cohn. He is the builder and he knows they are good," [111] I couldn't tell the buyer not to buy. Of course, I wanted the apartment buildings to be sold. Otherwise, we would not have put them up for sale.

However, I did not take the prospective purchasers and show them the buildings, to the best of my knowledge.

Q. Did Mr. Burdette and Mr. Hotaling do the same thing with prospective buyers? Did they come to you and introduce you to them and did you assist them?

A. Hotaling would bring buyers in the office. He would have to bring them in for me to close the deal.

Q. Where the deal had not been closed.

A. With Mr. Hotaling and Mr. Burdette, if I may qualify my remarks, when they would have a prospective buyer they would bring him in with the money. A lot of times I would write the deposit up and draw the final papers because with only two men working on a tract of 130 houses, or 109 houses, on a Sunday, we would be very busy, and Mr. Hotaling would not have time to write a deposit.

The Court: Did you ever turn down a prospective buyer? At any time?

The Witness: Yes.

(Testimony of Edgar M. Cohn.)

The Court: What would be some of the reasons that you would reject an offer?

The Witness: In regard to the 130 houses, we would reject a buyer if we decided or if the loan company decided [112] they were unable to keep the monthly payments up on the property, if they were not financially able to make their payments.

The Court: Would that be the chief reason or would there be other reasons that you would take into consideration? Would you take into consideration the general desirability of the buyer as someone who was going to be in that particular tract?

The Witness: Yes. When you sell houses you try to sell the houses to people that you think look respectable.

The Court: So that people will more or less get along with each other.

The Witness: If someone looked disreputable or was an odd character, we would not sell to them, because of the fact that when the houses were being completed the people were moving in, and if we had somebody who was disreputable or an odd character, that would change the value of the neighborhood and the valuation of the home.

The Court: Who would make the decision on that particular point?

The Witness: That was up to the company, the Security Construction Company, or myself, acting for them, your Honor.

Now, on the 109 houses, we were required to sell to an eligible war worker. We did not determine

(Testimony of Edgar M. Cohn.)

the eligibility [113] of the war worker, but if he had a card known as a V card filled out by the war housing center, then we were permitted to sell to him.

The Court: That was a primary qualification?

The Witness: It was absolutely necessary.

The Court: After that qualification was met, would you exercise any judgment?

The Witness: Within a reasonable scope. So long as a person was employed in active war work, we didn't say, "Because you have five or six children we are not going to sell the house to you." We didn't make that a consideration whatsoever. We were only interested in seeing that the houses were sold to eligible war workers in order that they may have a place to live to produce armament, in most cases, so we could win the war.

The Court: The very fact that they had a war job meant that they had met certain tests of fitness.

The Witness: That practically qualified them, the fact that they had a card.

The Court: You weren't dealing with all of the public in that situation. You were dealing with people who had gone through some selective process in order to have jobs and to get one of the cards that entitled them to purchase a home out of the war housing construction.

The Witness: That is right, your Honor. [114]

The Court: But even there, if any judgment or decision were to be made, that would be made by the

(Testimony of Edgar M. Cohn.)

partnership, or yourself acting for the partnership, and not by the broker?

The Witness: Yes.

The Court: The broker was just your agent, is that right?

The Witness: Right. To continue, in the sale of the multiple buildings, the 56-multiple building in Tract 13170 and the 13-multiple building in Tract 13172, I had no choice.

Let me put it this way: I had to accept the deal if Field brought a purchaser with him.

The Court: Why was that?

The Witness: According to the agreement I had with Mr. Field that if he brought a purchaser who had the financial requirements, since this purchaser was not going to occupy the buildings, he was going to buy them as an investor, since he had the money to pay for it, then I would have to pay Field a 5 per cent commission.

The Court: Was that agreement set forth in any written document?

The Witness: Yes, your Honor.

The Court: And we have that in evidence?

Mr. Conroy: That is Exhibit S.

The Court: Was there anything else you wanted to [115] explain about this general matter? Have you covered it?

The Witness: I think I have covered it, your Honor.

The Court: Mr. Chehock, you may proceed.

(Testimony of Edgar M. Cohn.)

Q. (By Mr. Chehock): What percentage of the 69 apartment houses were sold for cash?

A. I don't remember. The books will show that.

Q. Was quite a large percentage of them sold for cash?

A. Oh, no. Practically all were sold—I don't recall of any purchaser coming in and paying all cash for the buildings.

Q. Where they weren't sold for cash, but were sold on contract, you had to approve the particular purchaser, didn't you, before the sale went through?

A. No, I had to take the purchaser which Mr. Field had or pay a commission, so long as the purchaser met the financial requirements.

Q. Did you decide whether he met the financial requirements?

A. That was set forth in the agreement with Mr. Field. So long as Mr. Field brought me a buyer with a minimum down payment, I had to take him.

Q. My recollection of reading that agreement doesn't say anything about the financial statement of the buyer.

A. I didn't take any financial statement from the [116] buyer.

Q. No, I mean that you didn't have the right to decide on whether or not the buyer met the financial conditions that you would require.

A. I didn't say that I had any financial conditions that had been met or considered on the financial stability of the buyer. All that was required was that the buyer be able to furnish so much cash.

(Testimony of Edgar M. Cohn.)

Q. I am not talking about that.

A. That is what I am referring to, anybody that bought had to make a down payment.

Q. If someone came up that wasn't good, financially, a good financial risk, you would turn it down?

A. I didn't know whether he was or not. I couldn't determine that. So long as he had the down payment——

The Court: Mr. Chehock, I would like the record to be clear on a point here as to whether we are getting into a matter of construing that contract.

If you would like to show the contract to the witness to look at it, again, let's find out whether the witness is talking about what the contract required, and if he is talking, also, about his way of dealing under the contract, which would not, necessarily, all be described in detail in that contract.

The point here is whether the amount of judgment [117] exercised by Mr. Cohn, acting for the Security Construction Company, differed in the sales that were made by Mr. Field under the contract which is Exhibit S from the general arrangement that existed in the sales of houses in other tracts. That is what your line of questioning deals with, isn't that right?

Mr. Chehock: Yes, and I would like to have the witness answer that.

The Witness: Will you repeat the question you want me to answer, Mr. Chehock?

(Testimony of Edgar M. Cohn.)

The Court: Supposing you ask the question, please.

Q. (By Mr. Chehock): Was your scope of authority and judgment in accepting buyers the same, approximately, in the sale of the 69 apartment houses as in the sale of the single unit houses?

A. No, it was not.

Q. In what respect was it different?

A. It differed in the respect that with the 69 apartment buildings, so long as the buyer had the down payment, unless I approved of the sale and signed the papers, I would have to pay a commission.

In the sale of the single dwellings, I had the entire right to approve or disapprove any sale for any reason whatsoever.

The Court: Let's then look at Exhibit S, which is [118] your agreement with Mr. Field, and find the paragraph which states that if he brought a prospective buyer to you and you rejected the deal, that you would, nevertheless, pay Field a commission.

The Witness: Yes, I have it here. It reads as follows:

"In case of sale of said property during the term of this agreement, whether made by undersigned, by Eddy D. Field, or his agents or brokers, or through or by any other agent or subsequent to the termination hereof to any party introduced to the undersigned by Eddy D. Field, his agents or brokers, or if Eddy D. Field produced a purchaser ready, willing and able to purchase said property at the

(Testimony of Edgar M. Cohn.)

price, and on the terms and conditions above, during the term of this agreement, undersigned agrees to pay said Eddy D. Field the regular Realty Board commission of 5 per cent on the sale price."

The Court: If he produced a buyer, ready, willing and able.

The Witness: Yes.

The Court: Who was to decide whether the buyer was able?

The Witness: As long as the buyer had the down payment he qualified according to my understanding.

The Court: Let me see. Let's try and illustrate that situation. These are sales of houses within what you [119] call the 69 group.

The Witness: The apartment buildings.

The Court: They were either two-family or four-family houses?

The Witness: That is right.

The Court: You called them apartment buildings. That gives us a picture of a little larger building. Let me ask you this: Let's take one of the four-family houses. Would it be four families in one unit or were they adjoined?

The Witness: They were on adjoining lots. If I may step up to the blackboard, I may be able to illustrate it.

The Court: I have seen a lot of war housing. I just want to ask you one or two questions about it. Would it be a two-story building?

The Witness: No, they were one story high. Each

(Testimony of Edgar M. Cohn.)

apartment was staggered. It was like a saw-tooth arrangement.

The Court: It had four apartments and four separate entrances. Separate entrances all on one floor?

The Witness: All on one floor.

The Court: You wanted to get rid of the property?

The Witness: To sell the property.

The Court: Did you care whether you were selling it to someone who was going to live in it or who was just going to buy it for resale?

The Witness: I didn't care who bought it. [120]

The Court: The contract was subject to the 25-year loan that had been made by the Glendale Federal Savings and Loan Association?

The Witness: Unless the purchaser, when he purchased the building, would pay the loan off.

The Court: Those could be accelerated?

The Witness: The Federal Housing Administration has an acceleration, but you can pay it off with a penalty.

The Court: The service charge.

The Witness: The service charge.

The Court: So the requirement to be met really was chiefly the financial requirement, wasn't it?

The Witness: If an investor bought the building, or if a purchaser bought the building and would not buy the building unless he could occupy an apartment, he would have to meet the requirements of the National Housing Agency 60-3B.

(Testimony of Edgar M. Cohn.)

The Court: Other things being equal, isn't it true that the buyer had to satisfy the financial requirements which were payments that either you or Field might be concerned with?

The Witness: That was the overriding requirement.

The Court: That was the overriding thing that had to be met. These 69 units had been constructed with borrowed money and all you were selling was an equity, isn't that right?

The Witness: We were selling the building subject [121] to a first trust deed.

The Court: Isn't that the usual expression you use? You wanted to get back what you had put in the property, but all of the property was subject to mortgage.

The Witness: It was all subject to mortgage and the way we sold the building was to take the sale price and deduct the mortgage from that and the difference would be met partly by cash and partly by a contract to ourselves.

The Court: The buyer took over the mortgage. Didn't the Federal Housing Administration allow those mortgages to be transferred to the buyer?

The Witness: Yes.

The Court: They didn't have to be refinanced?

The Witness: However, the buyer could not assume the mortgage so long as there was any secondary financing on the building. If the buyer came to us and paid us cash to the mortgage, then

(Testimony of Edgar M. Cohn.)

he could substitute liability under the terms of the deed of trust.

However, if he only partially paid us the difference between the sales price and the mortgage, then we entered into a contract with him whereby he agreed to make certain monthly payments, both on the F.H.A. mortgage and on the equity to us. In that way, when the equity had been paid in full, then he would assume the F.H.A. mortgage and we would give him a deed at that time. [122]

The Court: This isn't the accurate way of stating my understanding of your testimony on that point, but, roughly, over and above the first trust or first mortgage, there might have been something that constituted a second mortgage?

The Witness: Yes, in effect.

The Court: Or if the buyer couldn't make a large enough down payment, you were willing to take a second mortgage?

The Witness: In effect, yes.

The Court: So that there would be a down payment and then the buyer would be making some payments to the Security Construction Company for a while and then would take over the property subject to the first mortgage.

In other words, to get all of that into the record here, we would have to have from you a sample of your sales contract, and I don't know whether you plan to introduce any of those with respect to these 69 houses.

(Testimony of Edgar M. Cohn.)

Mr. Chehock: I believe that is in evidence as Exhibit R.

The Court: I won't take the time to read this, but I suppose that is a contract where the payments were made to the Security Construction Company.

Mr. Conroy: Yes. We have all of the contracts that were entered into. They have been examined by the Treasury Department. Rather than encumbering the record with each one, we put one of these in as a sample. [123]

The Court: I would like to finish this line of inquiry with one more question. Since, in a good many instances, payments would be made to the Security Construction Company for some period, didn't you have to satisfy yourself about the financial ability, and that is where the word "able" comes in? I am referring to the phrase "ready, willing and able."

Since not only the Glendale Federal Savings and Loan Association had an interest in the contract, but you, yourself, your partnership, had an interest in the contract, could Mr. Field hold you to such a strict interpretation of that clause that you had to take anyone he brought in?

The Witness: Could I answer the first part of the question first? We were not worried about the monthly payments being made to us on the contract, or the payments being made to the first mortgage on it. We considered the down payment by the purchaser sufficient that if they didn't make their payments, we would take the property back

(Testimony of Edgar M. Cohn.)

and resell it. We thought we would never lose anything because of the down payment they have made which was more than 15 or 20 monthly payments. That was the answer to the first part.

The Court: All right.

The Witness: And that is why I absolutely knew that if I didn't take a purchaser that Mr. Field presented to me with the down payment I was going to pay him 5 per cent, knowing [124] Mr. Field as I did. Either he was going to get the commission when he brought in the prospective customer, or he would get 5 per cent for the sale of the building.

The Court: I don't see why you stress that because isn't that an ordinary contract provision when you have a broker? A broker has to have a provision of that kind to protect himself.

The Witness: That isn't the agreement we made with Mr. Hotaling or Mr. Burdette. We told them we would pay them for each building that we sold with the understanding that we were to qualify everybody.

The Court: With respect to the clause that you read in Exhibit S, is that an unusual clause?

The Witness: We were not in the custom of signing contracts with brokers.

The Court: But you did with Mr. Field.

The Witness: Yes. We knew what the custom of the business was and we would never sign a contract with anybody else on that basis.

The Court: Other than Mr. Field.

(Testimony of Edgar M. Cohn.)

The Witness: Other than Mr. Field for these particular buildings.

The Court: I guess we can pass the point.

The Witness: If I haven't made myself understood, I will be happy to answer your questions to the best of my [125] knowledge.

The Court: It seems to me that you stress rather heavily the provision in Exhibit S that you were to accept buyers who were "ready, able and willing," who were brought in by Field, the broker.

The Witness: We had never made an agreement whereby the penalty provision was made in a contract for the sale of property, and the reason I stress it is the fact that every buyer that was brought up I knew that unless I accepted the buyer that I would have to pay the commission, which would be greater.

The Court: You may never have entered into that kind of a contract before, but in this whole project it wasn't necessary for you to enter into that kind of a contract, but once you had made an arrangement with Field, then the Court's question is wasn't Field's requirement a perfectly ordinary requirement of a broker because brokers can't run around town and spend hours interviewing people and then bring them in to the principal and have the principal, for some real or fanciful reason, say, "I don't want to deal with that prospect you brought in. Get me another one."

He said, "I have to protect myself against things like that. I will have it in the contract that if I

(Testimony of Edgar M. Cohn.)

produce a buyer who is ready, able and willing, and if, for some reason you may think of, you may not want to close a deal [126] with that buyer, it is all right, but I get my commission because I put in a lot of time on it."

I am Mr. Field and I say to you, "Mr. Cohn, we have been doing business for a long time and I have a lot of confidence in you, but this is the customary clause that brokers put in, and if we are going to write a contract, let's put it in."

And you say, "All right, Mr. Field, all right."

Isn't that just about what is involved in that clause in Exhibit S? If it is not, I want you to tell me about it.

The Witness: If I can answer that, it is customary that a broker have a penalty provision——

The Court: You agree to that.

The Witness: Yes. However, we are not in the habit of putting it in our agreements with the brokers.

The Court: That is just sort of beside the point. There is always a first, and that was the time you did it, and that is that.

All right, Mr. Chehock.

Q. (By Mr. Chehock): Isn't it true, Mr. Cohn, that all of the mortgages on all of these houses that you have built, the single unit houses as well as the 69 multiple houses, the two-unit and the four-unit, were financed through F.H.A. under 25-year loans?

A. The trust deeds were financed by the [127] Glendale Federal Savings and Loan Association and

(Testimony of Edgar M. Cohn.)

insured by the F.H.A. who insured the Glendale Federal Savings and Loan Association against loss under the terms of the trust deed note.

Q. Were they all Title VI, F.H.A. 25-year loans?

A. Yes.

Q. On the single houses and the multiple houses?

A. Yes.

Q. That was the only financing available to you at that time? A. Yes.

Q. Now, if Mr. Burdette or Mr. Hotaling, in selling these single unit houses, had produced a buyer who was ready, willing and able, you would have to pay the commission for the sale, wouldn't you? A. No.

Q. Do you mean to say that if they brought up a buyer ready, willing and able, but you didn't like the color of his hair, that you could get out of paying him his $30.00 commission?

A. I could turn down the deal, but Mr. Burdette knew that we would have to sell all the houses and that they would get their commission on all the houses, whether I accepted a buyer he brought in on Monday or Wednesday.

Q. What I am asking you is if Mr. Hotaling found a buyer who was ready, able and willing and met all the [128] qualifications and came to you, he would be entitled to his commission?

A. No, if I refused the sale, he would not be entitled to the $60.00 according to our agreement.

Q. Did you ever have a situation where Mr. Burdette or Mr. Hotaling brought in a prospective

(Testimony of Edgar M. Cohn.)

buyer who was ready, able and willing, that you turned down?

A. I don't understand what you mean by "ready, willing and able," under the terms of selling those houses.

Q. Well, did Mr. Burdette or Mr. Hotaling bring to you any purchaser who met the financial qualifications, who looked like a good buyer that you turned down? A. There might have been.

Q. I am asking you was there any case?

A. I don't remember any specific case, but I know I have turned buyers down from time to time.

Q. You had a good reason? A. Yes.

Q. What were some of the reasons?

A. The reasons were the respectability of the buyers. We turned down buyers in the case of Mr. Hotaling because they didn't have the V card. So long as they had the V card, it practically qualified them. All they really had to have was the down payment, generally speaking.

Q. I refer you to Exhibit R, Mr. Cohn. I think your [129] return reflects that this particular sale was consummated on January 16, 1945, while the agreement for sale of the real estate is dated January 10, 1945. Can you state why that is?

A. The agreement was drawn up on the 10th day of January. The consummation would be at the close of the escrow.

Q. That is the reason for the difference between the date and the actual date the agreement was made with the buyer? A. Yes.

(Testimony of Edgar M. Cohn.)

Q. Were those multiple houses sold, in the main, to investors or occupant buyers?

A. To the best of my knowledge, they were all sold to investors.

Q. They were all sold to investors. Were the single unit houses sold mainly to war worker occupants or to investors?

A. If I may take the single houses in two groups, the 130 single houses were all sold to people who occupied them, however, they were not required to be war workers. We were able to sell to anybody.

The 109 were all sold to occupants who had V cards.

Q. By the V cards, what do you mean?

A. They were eligible under the National Housing Administration orders.

Q. Which is the same as war workers?

A. The same as war workers, but in all cases of the [130] single houses they were occupants, not investors.

Q. If the sales made of the multiple houses were to investors, in the main, the entering into leases in 1944 and '45 was an advantage from a sales standpoint?

A. We did not enter into any leases in 1945 at all. In my mind, if I were buying a building, I would rather buy a building with tenants with leases. I would know they would be there for a long time, thus assuring me a guaranteed return on my investment.

(Testimony of Edgar M. Cohn.)

Q. Throughout the year 1945, up to the time the multiple houses were sold, they were all held for sale, weren't they?

A. The multiple houses were held for sale in 1945.

Q. In 1945 while you didn't enter into any written leases, you did enter into some verbal leases feeling they would be an advantage for having them occupied for the purposes of sale?

A. I did not enter into any leases in 1945 with tenants.

Q. No verbal leases?

A. Just on a month to month occupancy basis.

Q. While the houses were up for sale in 1945, and when cancellations came around and the tenant moved out, you turned around and rented them on a month to month basis or some sort of a basis so that it would be better from the [131] standpoint of sale, didn't you?

A. Yes, if I may qualify that answer. We rented the apartments on a month to month basis because although we had buildings offered for sale, we didn't know if we could sell them, and I didn't want to lose occupancy money. My business was deriving rent from these apartments.

Q. I think some statement was made yesterday that the average length of the 69 leases was 20 months. I may be wrong on that.

A. I don't think that is correct.

Q. Will you correct that?

A. The first of these multiple houses were com-

(Testimony of Edgar M. Cohn.)

pleted some time in February of 1944 and the last of all the multiple houses were sold by October which would be the maximum of 20 months. I would say the average time we owned the buildings would be approximately 14 months, taking a mean average.

As far as the leases were concerned, I did not analyze the leases, but we signed one year leases with automatic renewals on the leases.

Some of the tenants that we originally signed leases with were living in the apartments when the buildings were sold.

Q. Some of the 69 apartment houses were rented not over seven, eight or nine months before sale, isn't that true?

A. I believe the shortest time that any building was [132] rented before it was sold was nine and one-half or ten months.

The Court: If you had given a tenant occupancy under a one-year lease and prior to the expiration of the one year you sold the unit in which he had his occupancy, then would the buyer take over that lease?

The Witness: Yes, we turned the lease over to the new buyer, the lease that was in effect at the time and that is the reason we cannot produce all of the leases because we gave them to the buyers.

Q. (By Mr. Chehock): I don't know whether this has been asked, but was there a written partnership agreement when the Security Construction Company was formed?

(Testimony of Edgar M. Cohn.)

A. Yes, when the partnership was formed in 1942, there was a partnership agreement.

Q. Do you have that agreement?

A. I don't have it with me.

Mr. Conroy: I have never seen it, but we will produce it.

Mr. Chehock: I thought it might throw some light on the purpose of the partnership.

Q. (By Mr. Chehock): Mr. Cohn, the Security Construction Co., Inc., a corporation, built and sold some houses in 1941 on Tract 12648, is that [133] correct? A. Yes.

Q. Where is that tract?

A. Tract No. 12648 is adjacent to Tract 13172. If you wish, I will be glad to step up to the map and illustrate it for you.

Q. All right.

A. Tract No. 12648 begins at this corner, which is cater-cornered to Tract 13172 and extends for 15 acres towards San Fernando Road and almost to the intersection of Keswick Street and Glen Oaks Boulevard.

Q. All of this tract and these other three tracts are on the very outskirts of Los Angeles?

A. They are in the San Fernando Valley. The Burbank city limits would be here. Los Angeles surrounds Burbank on all sides. Burbank is an island.

Q. This is a road, a main highway?

A. Yes, a main highway. That is dedicated for 100 feet.

(Testimony of Edgar M. Cohn.)

Q. This territory on the other side that appears blank on Exhibit 5, was that built up or unimproved or improved property?

A. At what time?

Q. In 1944, '45 and '46?

A. That was unimproved property in 1944, '45 and '46.

Q. Now, coming back to the summer of [134] 1943——

The Court: Mr. Chehock, how much longer is your cross-examination going to take?

Mr. Chehock: I would say, your Honor, less than a half-hour.

The Court: That is quite a long time. I must finish this case today, you know.

Mr. Chehock: I will be glad to hurry as fast as I can.

The Court: May I say that after all is said and done and these records are made in tax cases, we get down to a narrow question of some kind and it seems to me we go into so much detail in the trial of the case. You have done quite a conscientious job in stipulating a few facts, and agreeing on a great many exhibits, but we are going into a tremendous amount of detail in the examination of these witnesses. Is it really necessary?

Now, of course, I am very reluctant to attempt to judge that phase of our endeavor, but I wonder if you wouldn't, Mr. Chehock, look over your notes and see if you can't boil down the matters that you need to inquire into, into the essential matters so

(Testimony of Edgar M. Cohn.)

we will not have to have such an extensive description of situations, which is what we are getting.

Mr. Chehock: I will be glad to hurry as fast as I can. Of course, in my view, I am not asking for anything [135] that is not essential.

The Court: That is what I suppose is true. If I understand the narrow question in this case, this case is going to turn very much upon the method employed in selling the property. Isn't that true?

Mr. Chehock: I think that is one of the elements. I would not say it is the only one.

The Court: If that is one element, and if you then line up whatever second or third elements there are that have to be considered and get at the facts quickly, that relate to those things, we ought to be able to get through.

I think we are generous in our time with these trials. You asked for nearly two days' time on this case. You have all of the evidence before the Court in those exhibits, and what we are getting from these witnesses is a description of how they carried on their business. Why does it take a day and one-half to get that. This isn't a complicated business. You just compare a business of this kind with a manufacturing business, and you compare the issue in this kind of a case with the issue you have in a renegotiation case or a 722 or excess profits case. This is a standard case which gives the taxpayer and everyone else a great deal of concern, the fact that you have to differentiate between ordinary

(Testimony of Edgar M. Cohn.)

gain and capital gain. That is just one of the issues in tax law that troubles the taxpayers. This is a run of the mill, simple [136] case, and I should think that we should be able to go through the trial of the case like this more quickly.

I am experienced in this business. It does not impress the Court to take up time in going over a lot of details. We have a great many of these cases in court and I have heard two or three of them and decided them and I am thoroughly familiar with the general issue and the nature of the evidence.

I would like to take a recess for the reporter and then I hope we can move along fast in developing these points, Mr. Chehock, a little more rapidly and with less discussion.

Are you going to call any witnesses?

Mr. Chehock: At this moment, I don't think I will.

The Court: Are you going to be long on your other witnesses?

Mr. Conroy: I think I will have a few questions of Mr. Cohn on redirect examination and the two other witnesses will take approximately 15 minutes, so that my side of the case althogether will not have been more than an hour and one-half.

The Court: That is good. I think we ought to be able to finish with the case this morning.

Mr. Conroy: I don't know about that.

The Court: It all depends on how much time is going to be taken on cross-examination. If it is going to take a [137] lot of time——

(Testimony of Edgar M. Cohn.)

Mr. Conroy: I have redirect examination, of course, but it will not be too long. It will be very short.

The Court: I am almost inclined to call on counsel to say what it wants to find out, to see how much of this is absolutely material and necessary.

Mr. Conroy: I think that the evidence that the petitioner introduced was all directed to the point that the petitioners were holding property for investment purposes. Naturally, the letter they wrote to the accountant, the testimony of the change of purpose are some collateral facts to show the nature of the business, which is, I think, material. We tried to direct all of our attention to that one issue and I think that is the only issue involved. There are some collateral——

The Court: That is the general question, whether they were holding it for investment.

We will recess for a few minutes.

(Short recess taken.)

The Court: You may proceed, Mr. Chehock.

Mr. Chehock: That is all I have of this witness.

The Court: I beg your pardon?

Mr. Chehock: That is all. [138]

Redirect Examination

By Mr. Conroy:

Q. Mr. Cohn, according to your records did you sell any of the apartments, the 69 apartments in the two tracts about which we have been talking, to any of the occupants or tenants of those buildings?

(Testimony of Edgar M. Cohn.)

A. No.

Q. How many vacancies were there in the entire 69 buildings, which is 210 rental units, as of the time of the sales? A. Six or seven.

Q. Now, at the time that these buildings were completed and ready for occupancy, did you have in mind that those could then and there be sold to investors?

A. Yes, but with the investors agreeing to hold them for rental under the requirements of the law. If I may add something to that—during the course of the construction my impression was that I could sell those buildings to investors. To me, it didn't seem important whether I rented them or the investors rented them, so long as they were rented to the proper people.

Q. So long as they were rented to war workers?

A. Yes.

Q. And on cross-examination you were asked whether you determined to rent these houses by reason of the requirements [139] of the N.H.A., and for that reason only. As I recollect your testimony, you answered that in the affirmative. Do you wish to make any explanation of that answer?

A. Yes. The way I understood it was—the answer to were we required to rent the apartments by the 60-3, we were. However, we wanted to rent them and could rent them and could sell them at any time.

Q. Well, did you determine to rent the houses only by reason of the fact—and when I say houses,

(Testimony of Edgar M. Cohn.)

I am referring to the apartments—that the National Housing Agency required rental?

A. Oh, no. We wanted to rent the buildings and hold the buildings for investment purposes.

Q. I see. Now, there has been introduced into evidence here a statement of all of the leases that were renewed after the original tenant moved in. Did you enter into a written lease in the form similar to Exhibit 18 with reference to all tenants?

A. In all of the 69 buildings, yes.

Q. And was it the same kind of a lease?

A. Yes. As I recall, it was about the same. Wolcott's 955 was the form we were using.

Q. On Exhibit 16 there is a list that has been stipulated of apartments that were vacated after the original renting and re-rented. My question is directed to that point. With [140] reference to the apartments that were vacated and the original tenants who stayed in, those are not set forth in this exhibit? A. That is correct.

Q. And other than what is set forth in Exhibit 16, other than the units set forth therein, the original tenants were in at the time the buildings were sold by you? A. That is right.

Q. Now, you purchased Tract 13170 from your father, Max Cohn, didn't you? A. Yes.

Q. What did you pay for that?

A. May I refer to my figures?

The Court: You may, if there is no objection.

Mr. Chehock: Where did you get those figures?

(Testimony of Edgar M. Cohn.)

The Witness: From the books.

The Court: You may refresh your recollection from that note.

The Witness: For Tract 13170 for the 56 lots we paid $42,650.00. For the lot breakdown——

Mr. Conroy: I don't think it is necessary to do that.

Q. (By Mr. Conroy): What did you pay your father for Tract 13171?

A. $10,050.00 for the 13 lots and for the 109 lots —let me put it this way: For the 122 lots in Tract 13171, [141] we paid $80,025.00.

We paid $10,050.00 for the 13 lots on which we built the apartment buildings.

Q. Was that your purchase price based on the Federal Housing Administration valuation?

A. Yes.

Q. Was it equal to the Federal Housing Administration valuation?

A. In fact, it was based on the price that the Federal Housing Administration put on their letter of commitment for each lot.

Q. That is the price you paid?

A. That is the price we paid.

Q. Will you tell the Court, in as brief a statement as you can, the details of the work that you did with reference to operating the rental building?

A. I maintained a rental office, employed personnel to assist me, to collect rents and show apartments. I managed the entire project, hired the maintenance men, gardeners and so forth. I en-

(Testimony of Edgar M. Cohn.)

forced the collecting of the rent and conducted a rental business.

Q. Did you have a secretary there helping you?

A. Yes, I had a secretary helping me.

Q. With reference to the operations of the rental business? [142]

A. I had one secretary helping me with reference to operating the rental business, and I had one secretary with reference to conducting the building business.

Q. You testified that you did furnish a model home with reference to the sales of single family residences? A. Yes.

Q. Did you furnish a model apartment of any kind with reference to the sale of the apartment buildings? A. No.

Q. Now, on cross-examination you testified as to your activities with reference to the sale of this property after you determined to sell it. I believe you said that you employed Eddy Field and another broker. When I say "this property" I mean, of course, the apartment buildings. During that course of selling, did you also attempt to rent the buildings?

A. Yes, I conducted my normal rental business because I didn't know whether the buildings would be sold.

Q. When you testified you were holding the buildings for sale, was that your idea of holding them for sale?

A. Yes, that was my idea. Besides holding them

(Testimony of Edgar M. Cohn.)

for sale, I continued to conduct the rental business.

Q. Now, did Mr. Burdette, Mr. Cochrane or Mr. Hotaling pay rent to you while they were selling single family dwellings? A. No.

Q. Is Mr. Field still occupying the building that you [143] mentioned, or one of the buildings out there?

A. He originally occupied the sales building and now he is occupying the building we used, the 10 by 22 building when we moved out.

Q. He pays you rent? A. Oh, yes.

Q. Does the partnership have any office facilities there? A. None.

Q. In either one of those buildings?

A. No.

Q. You testified concerning the Pasadena property and the method of sale, that you employed brokers there. Did you have any reason for not having salesmen or brokers, such as Mr. Cochran and Mr. Burdette and Mr. Hotaling, in operating on that basis?

A. Yes, there was a definite reason.

Q. What was that?

A. The Pasadena property is a property where the priorities were granted for minority groups. Naturally, we had to buy property where the minority groups lived. I attempted to sell these people and I had to employ a broker who had been dealing with minority groups, in whom the minority groups had confidence.

Q. Is that the manner in which you sold them?

(Testimony of Edgar M. Cohn.)

A. Yes. [144]

The Court: May I inquire there if you mean all colored people?

The Witness: Colored people and Japanese people.

The Court: Do you mean they wouldn't believe you?

The Witness: I tried to sell them and they thought I was trying to put something over on them, that I was going to give them a hot house, just take their money and I just couldn't make them trust me.

The Court: Who would they trust?

The Witness: People of their own race or persons who had been living in the area for some 20 or 30 years and were established in business there.

Q. (By Mr. Conroy): I believe on cross-examination you referred to Mr. Field's office as being designated as Field's Glendale Office No. 3. Do you recall whether that was the correct designation?

A. Yes, he repainted the entire office in his colors that he used. I believe it was black and——

The Court: I am not interested in that.

The Witness: He repainted his office, put up his own signs, designating Eddy D. Field, and he called it Branch Office No. 3.

Q. (By Mr. Conroy): Did he have the word "rental" or "sales office"?

A. Sales office. [145]

Q. You testified it was rental office on cross-examination.

(Testimony of Edgar M. Cohn.)

A. I wish to correct that. It was a sales office.

Q. Now, on cross-examination you testified that you sold the single family residences to occupants. I would like to know whether by that you mean people who were going to occupy or people already in occupancy?

A. People who were going to occupy.

Q. You also testified on cross-examination that you made no new leases in 1945 with reference to the 69 buildings. Will you state why you did not?

A. The O.P.A. ruled early in 1945 that we could not collect the last month's rent in advance, even if we had a lease. The advice of the attorneys to me was if we signed leases with the tenants that the tenant would have the advantage whereby they could keep the apartment as long as they wished to. I would have no security if they didn't pay their rent and it would be entirely disadvantageous to us. For that reason, I didn't enter into any new leases.

Q. Did you continue to rent the property on a month to month oral agreement?

The Court: Of course, the Court will find it difficult to accept your explanation or reasoning that a lease does not give you any security, because leases are ordinarily entered into for the purpose of giving security [146] to each party. If a tenant breaches the lease, you have a right of action.

The Witness: That is not only my opinion, but, actually, when a tenant was either called into the Service or moved to another part of the country, it

(Testimony of Edgar M. Cohn.)

was not economically logical to sue under the terms of the lease.

The Court: Do you mean to say that circumstances were such that a lease didn't really mean anything to you?

The Witness: It did mean something to us.

The Court: You have just stated that a tenant could move away. At that time, was it customary to use what is called the Army-Navy clause?

The Witness: We never inserted it. However, if a man was called to the Service and was in the Service, we always breached it.

The Court: You expected to accept cancellation?

The Witness: We accepted a cancellation and returned all security posted. We would not penalize them because he was transferred or called into the Service.

The Court: Under those circumstances, you thought it was 50 of one and a half-dozen of all. If you had a lease you were going to accept surrenders of the property anyway, so why take a lease.

The Witness: Only from certain persons. Only from persons called into the Service, but for a war worker, a [147] person who was not in the Service, we signed the lease because it gave us security and also gave the tenant security, where he knew we couldn't get him out.

Q. (By Mr. Conroy): What security did you have?

A. The last month's rent, and the fact that when

(Testimony of Edgar M. Cohn.)

he signed the lease I firmly believed the tenant would stay there until two or three years.

Q. You continued signing leases until the O.P.A. would not——

The Court: The Court will have to weigh that explanation, because in some localities at certain times it is customary to ask for deposits of the last month's rent. But ordinarily, on the whole that is not a customary requirement, so that in this instance, when the O.P.A. ruled that the lease could not be writen with the requirement of the deposit of the last month's rent, I don't understand why that should have been a determining factor in giving up the requirement of leases.

It seems to me that is a matter of interpretation that the taxpayer wanted to put on that situation.

Mr. Conroy: I think it is a matter of business judgment. It was his judgment that he should run his business that way. That is the only purpose of the evidence. It may be accepted or it may [148] not.

The Court: Very well.

Mr. Conroy: I have found the exhibit I was looking for, counsel, and I will show it to you.

Mr. Chehock: No objection.

Q. (By Mr. Conroy): Mr. Cohn, I show you a letter dated January 11, 1943, addressed by the Security Construction Company to Edgar T. Burdette engaging his services to sell the houses in Tract 13172 for $30.00 a house. Is that your signature on the agreement? A. Yes.

(Testimony of Edgar M. Cohn.)

Q. Is that Mr. Burdette's signature on the agreement? A. Yes.

Q. Did Mr. Burdette sell the houses pursuant to that agreement? A. Yes.

Q. I call your attention to the statement that "We will pay you a commission of $30.00 payable when complete down payment is paid and sale approved by us on each house in Tract 13172 sold on or after January 11, 1943. This agreement may be terminated at any time by either of us, in writing."

When you testified on cross-examination that you were to approve the sale, did you have that provision in mind? A. Yes.

Mr. Conroy: I would like to introduce that [149] into evidence.

The Court: Without objection that will be received in evidence as Exhibit No. 23.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 23.)

PETITIONER'S EXHIBIT No. 23

Security Construction Company
Developers of Beautiful Glenwood
7801 Glen Oaks Boulevard
Burbank, California
STanley 7-3536

January 11, 1943.

Mr. Edgar T. Burditt,
7801 Glen Oaks Blvd.,
Burbank, California.

Dear Mr. Burditt:

We will pay you a commission of $30.00, payable when complete down payment is paid and sale approved by us, on each house in Tract 13172, sold on or after January 11, 1943.

This agreement may be terminated at any time by either of us, in writing.

Your truly,

SECURITY CONSTRUCTION CO.,

By /s/ EDGAR M. COHN,
Co-Partner.

EMC/DC

Accepted:
/s/ E. T. BURDITT.

Admitted in evidence December 6, 1951.

(Testimony of Edgar M. Cohn.)

Q. (By Mr. Conroy): Mr. Cohn, have you determined what your percentage of occupancy of the 69 rental buildings was during the entire time that you owned them? A. Practically 100 per cent.

Q. How far from 100 per cent?

A. Approximately 99 per cent.

Q. Would you say it was more or less?

A. I would say 99½ per cent.

Q. That would be about mathematically correct?

A. I would say yes.

Mr. Chehock: Does the exhibit show the exact figures?

Mr. Conroy: It does, but I think it substantiates the last statement and it shows the actual days of payment.

Q. (By Mr. Conroy): What was the annual income from rentals of the 69 apartment buildings with 100 per cent occupancy?

A. May I look at the figures? I projected an annual rental income, and the income based on a full year at full [150] 100 per cent occupancy would be $123,000.00, approximately.

Q. Do you know what the depreciation on the buildings was? A. Yes, it was $22,700.00.

Q. And did you determine from your books the repair and maintenance charges that were required to operate those apartment buildings for one year?

A. Yes, we took the average of repair and maintenance for the time that we operated the apartments and arrived at the figure of $12,120.00 projected for one year.

(Testimony of Edgar M. Cohn.)

Q. How about insurance?

A. Insurance projected for one year was $1,750.00.

Q. What was the office expense, telephone and salaries?

A. On office expense I estimated one girl that I paid $75.00 a week to take care of nothing but rentals, plus the use of the office, telephone, stationery, and so forth, $100.00 a week or $5,200.00 a year.

Q. What was the interest on the loan?

A. $28,000 based on a full year.

Q. Do you know what the taxes were for 1945 and '46, that is, real estate taxes, city and county?

A. $11,938.59.

Q. Would that constitute substantially all of the expenses of operating the rental buildings?

A. Yes. [151]

Q. And what does that total?

A. That totals $81,700.00, approximately.

Q. What net rental would there be from the operation of those buildings as rental?

A. Approximately $41,000.00.

Q. I notice on Petitioner's Exhibit No. 16 indicating days lost in rental, that you have one apartment that was vacant for 70 days which appears to be at 8106 DeGarmo. Can you state why you had 70 days vacancy there?

A. The tenant in possession refused to pay the rent and I had to take eviction proceedings against

(Testimony of Edgar M. Cohn.)

her. By the time I got her out, we had lost a great deal of rent.

Q. Mr. Cohn, you have been asked on cross-examination concerning these various sales that you made of properties in partnership as well as the other corporation known as Security Construction Co., Inc. It has been brought out that you built and sold those buildings.

I will ask you whether you have engaged in the business of renting income properties similar to these or substantially similar at any other time?

Mr. Chehock: Are you talking about the corporation, the individuals or the partnership?

Mr. Conroy: I am talking about him. I want to know whether he has business similar to what we contend he is engaged in here in addition to this business. [152]

Mr. Chehock: Do you mean an individual——

Mr. Conroy: He and his brother are sole owners of another corporation.

The Court: That calls for an opinion, and aren't we going outside of the taxable years? Does that not mean that you are going to try another case, almost?

Please read the question.

(The question was read.)

The Court: There are several things about that question that should be objected to. If you have an objection, please make it.

Mr. Chehock: My objection is that it is not en-

(Testimony of Edgar M. Cohn.)

Q. How about insurance?

A. Insurance projected for one year was $1,750.00.

Q. What was the office expense, telephone and salaries?

A. On office expense I estimated one girl that I paid $75.00 a week to take care of nothing but rentals, plus the use of the office, telephone, stationery, and so forth, $100.00 a week or $5,200.00 a year.

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Mr. Chehock: Are you talking about the corporation, the individuals or the partnership?

Mr. Conroy: I am talking about him. I want to know whether he has business similar to what we contend he is engaged in here in addition to this business. [152]

Mr. Chehock: Do you mean an individual——

Mr. Conroy: He and his brother are sole owners of another corporation.

The Court: That calls for an opinion, and aren't we going outside of the taxable years? Does that not mean that you are going to try another case, almost?

Please read the question.

(The question was read.)

The Court: There are several things about that question that should be objected to. If you have an objection, please make it.

Mr. Chehock: My objection is that it is not en-

(Testimony of Edgar M. Cohn.)

tirely clear what he is talking about when he asked the ultimate question.

The Court: Not clear in what respect?

Mr. Chehock: Whether he is talking about himself, the partnership or the corporation.

The Court: The time is not clear.

Mr. Chehock: No.

The Court: Also, in your preliminary statement you referred, in general, to some testimony about the corporation, and the record will show there has been very little testimony about the corporation. That is the recollection that I have. That the corporation was inactive and the partnership was carrying on the business during the [153] years involved in this proceeding. The testimony is that Mr. Edgar Cohn, as a member of that partnership, was busily occupied as a member of the partnership during the taxable period.

The question is objectionable for several reasons, and the objection is sustained.

Mr. Conroy: Very well, I will approach it from another angle.

Q. (By Mr. Conroy): Mr. Cohn, during the year 1947 did you and your brother, Daniel Cohn, engage in the building business, building apartments and holding same for rental? A. Yes.

The Court: Isn't 1947 one of the years involved here?

Mr. Chehock: No.

The Court: That will make the year 1947 in-

(Testimony of Edgar M. Cohn.)

volved and we are going to be bound by it. You are going beyond the taxable years.

Mr. Conroy: I would like to cite to the Court the Ehrman versus the Commissioner Case.

The Court: On what point?

Mr. Conroy: On the point of going beyond the taxable year.

The Court: I am acquainted with that. I [154] want to be clear about the question. The question is during 1947 did you and your brother engage in a certain business?

Mr. Conroy: Yes.

The Court: Was the Security Construction Company, a partnership, in business in 1947?

Mr. Conroy: Yes, it was. It is still in existence.

The Court: Your question isn't clear. I will let you go beyond the taxable year, but I would like to know whether, in that question, you mean to ask this witness whether he and his brother, apart from the work they did under the partnership, were engaged in some other enterprise.

Mr. Conroy: That is right. It was a preliminary question. I intended to ask that next.

The Court: I would prefer that you lay your foundation before you get to your ultimate question.

Mr. Conroy: All right.

Q. (By Mr. Conroy): Do you have a corporation or are you a stockholder in a corporation known as Orange Gardens? A. Yes.

Q. Who are the other stockholders?

A. Daniel E. Cohn and Edgar M. Cohn.

(Testimony of Edgar M. Cohn.)

Q. Are you the sole stockholders? A. Yes.

Q. You own it on a 50-50 basis? [155]

A. Yes.

Q. Has that corporation, acting through you as the stockholders, constructed and held for rental other apartment buildings which you constructed in 1947? A. Yes.

Q. And do you still hold those apartment buildings for rental? A. Yes.

Q. How many apartment buildings are there?

A. Eleven buildings consisting of 91 apartments.

Q. Have you sold any one of those?

A. No. I have had offers to sell them, but I have turned them down.

Q. Are you holding them for sale now?

A. No.

The Court: Mr. Conroy, why would you ask a question of that kind on redirect examination instead of on direct examination. What is your reason for doing that?

Mr. Conroy: I might explain it in this way: I did not, as I recall, go into the Security Construction Co., Inc., on direct examination and that was gone into on cross-examination. I felt that since we had left the partnership on cross-examination and shown sales in their usual course of business of single family houses, that it was then material for me to counter that with the holding [156] of apartments for rental, primarily for rental, on other occasions. That is where the materiality comes in.

The Court: The partnership is known as the

(Testimony of Edgar M. Cohn.)

Security Construction Company and the corporation is known as the——

Mr. Conroy: The Security Construction Co., Inc.

The Court: It has a similar name.

Mr. Conroy: That is right.

The Court: I don't recall this matter that you say was taken up on cross-examination in the taxable years 1945 and 1946.

Mr. Conroy: That is right.

The Court: And I understood that the Security Construction Co., Inc., the corporation, for 1945 and '46 was dormant.

Mr. Conroy: That is right.

The Court: And that it didn't hold property for sale or rental.

Mr. Conroy: In 1941 it did. That was the evidence.

The Court: That is before the taxable years.

Mr. Conroy: And this is after.

The Court: Did you make any objection to these references before the taxable years? I don't suppose you did.

Mr. Conroy: I might say from the reading of the tax cases in the Circuit Court of Appeals it occurred to me [157] that my objection would be overruled.

The Court: Again, we are going into a matter which is beyond the area of our consideration and it is difficult for the Court to know the importance of these details. Now, if we are going to have to go into the operations of these taxpayers prior to the

(Testimony of Edgar M. Cohn.)

taxable and after the taxable years, we will do that, but if the Court receives any evidence about activities other than the ones involved under the issue presented in this case, then the Court is going to require that you go into those matters thoroughly because it means nothing to the Court for you to refer to a corporation called Orange Gardens Corporation. When was it organized? Where does it carry on its business? Why, where and when and how? Do all of these things that you now refer to so briefly become material? You opened up that and the Court is going to inquire about it. I don't know when it was organized, but from the answer that has been given they had 91 apartments. I can see this kind of problem developing: The Security Construction Company, the partnership, had 69 apartments. They were two- and four-family units. Then we have to say what kind of properties were the 91 apartments, and so forth.

I know that it has been held that it is permissible to go outside the taxable years, but the rule is that that is within the discretion of the Court. Isn't that correct?

Mr. Conroy: The Ehrman Case didn't say that, I [158] don't believe.

The Court: What was the question presented in the Ehrman Case? Why was any question raised about going outside the taxable year? Did the Ehrman Case involve this problem?

Mr. Conroy: It involved the question of whether

(Testimony of Edgar M. Cohn.)

it was held primarily for sale or whether it was taxable as a capital asset. The government introduced evidence of subsequent years and the taxpayer contended that that was in error and the Court says: "Finally the taxpayers alleges error of admission into evidence of testimony of sales of lots and other transactions occurring subsequent to the taxable year in question. Testimony was allowed as to the opening of the new tracts for subdivision by the taxpayers in 1937 and 1938, and as to the volume of the sales of lots subsequent to 1935. The objection is that such evidence is entirely immaterial.

"We find no error here. The taxpayers contended at the hearing that the sales of property were isolated and casual and impelled by the stress of necessity. The evidence now objected to shows a continuation of a uniform course of action, unchanged in quality and increasing in strength and intensity. It has a very definite bearing on the issues of the case and was properly admitted."

(Ehrman vs. Commissioner, 120 Fed. (2d) 607.)

The Court: That is on the ground of [159] materiality.

Mr. Conroy: That is right.

The Court: So I am still puzzled why you didn't go into this matter on direct examination. If you think that under the holding in the case you have just cited it is material to show the facts relating

(Testimony of Edgar M. Cohn.)

to the continuous operations, continuous conduct of the business, then I don't understand why you didn't go into it on direct examination.

Mr. Conroy: My reason is this: I intended to call Mr. Daniel Cohn, but your Honor indicated a shortening of the trial was in order, so I told Mr. Chehock I didn't think I would call Mr. Daniel Cohn.

The Court: It is a good thing that that has come up. That suggestion that the Court is constraining counsel somewhat, of course, isn't fair or proper. You know, Mr. Conroy, that the Court's comments and requests about time had to do with wasting time with unnecessary details. This point has nothing to do with unnecessary details. This has to do with the material evidence to support the Petitioners' theory in the case.

Now, then, Mr. Conroy, I will have to state to you that if you want to go into evidence and proof to show what the continuous operations of the taxpayers have been, then you will have to go into that with complete thoroughness. I can not give any weight to the present amount of evidence we have on that point, namely, your question and the [160] answer relating to the Orange Gardens Corporation. I will have to know more about it.

Mr. Conroy: Very well.

The Court: Your idea that you would save time by not calling the witness is, of course, something for you to exercise your own judgment about, but let the record show that your thought on that point

(Testimony of Edgar M. Cohn.)

has no connection whatever with the Court's caution that time would be saved by getting down to the most essential things and passing over a lot of details.

The point you have in mind is part of your case and I still think it should have been taken up on direct examination.

May I say that we will finish the trial of this case today. We were given an estimate of time of a day and one-half and we will give it all of today and if we have to run late, we will run late. The case set for tomorrow is a one-day case which was crowded into a half day because of the time estimate in this case and another case. I am going to take up the next case at 9:30 tomorrow morning, but I am perfectly willing to have an evening session to finish this case so that we may go into all matters that are relevant to your case, but I will be unable to give any weight to just such a brief reference to business activities in a later year. That kind of reference does not establish any continual pattern. [161]

I think you are now going to have to tell us more about Orange Gardens Corporation, and I think you are going to have to tell us what happened after the buildings in the area covered by the exhibit before us were sold; whether the Security Construction Company, the partnership, continued in business; whether the taxpayers involved here was the partnership before the corporation began operations as a corporation; where they acquired property;

(Testimony of Edgar M. Cohn.)

how much property; who acquired it, the corporation or the individuals operating under a partnership; what kind of buildings; how long did they have them—if you go into that, you will have to go into it thoroughly.

Mr. Conroy: I have no objection to that. I intended to go into this more thoroughly. May I proceed?

The Court: Proceed.

Q. (By Mr. Conroy): When was the corporation Orange Gardens organized?

A. Approximately April, 1947.

Q. And is it still in business? A. Yes.

Q. Where are the properties of Orange Gardens?

A. North Long Beach.

Q. What type of buildings?

A. Multiple units.

Q. How many units per building? [162]

A. They vary. We have four units in a building, eight in a unit, and twelve units in a building.

Q. When were those buildings completed?

A. In March and April, 1948.

Q. And were they immediately put on the market for rental?

A. They were immediately rented.

Q. Have they been rented ever since?

A. Yes.

The Court: Now, Long Beach, for the purpose of the record, is located in an entirely different part of the area around here than Burbank, is that right?

(Testimony of Edgar M. Cohn.)

The Witness: They are both in Los Angeles County.

The Court: But Los Angeles County is very, very large. Where is North Long Beach? Is it over near the ocean? [163]

The Witness: Approximately seven miles north of the ocean.

The Court: And it is not near or neighboring the property we have been considering?

The Witness: No, it is not next to it.

Q. (By Mr. Conroy): How far away is it?

A. About 35 miles.

The Court: Did you do any more business in this area that you were in in 1945 and '46?

The Witness: Not immediately adjacent.

The Court: Do you have a name for that project we have been referring to in the record by the number of the tract? Was there a name given to it?

The Witness: Yes, we had a name.

The Court: What did you call it?

The Witness: Beautiful Glenwood.

The Court: Of course, everything in California is beautiful, so that was unnecessary, but you had "Beautiful Glenwood."

Then you had a development in Pasadena for colored people and Japanese. Did that have a name, too?

The Witness: It had no name.

The Court: When did you finish with that?

The Witness: We finished that operation in February and March, 1946, your Honor. [164]

(Testimony of Edgar M. Cohn.)

The Court: You did sell what you built there?

The Witness: Yes.

The Court: And then you said good-bye to the Glenwood region and went to fairer fields in the Long Beach area, is that right?

The Witness: Yes.

The Court: That takes us through 1946.

The Witness: Yes.

The Court: Or some part of 1946. In 1946 did you own any property over in North Long Beach?

The Witness: No, we purchased the Long Beach property in 1947.

The Court: How many acres did you buy?

The Witness: Approximately three acres.

The Court: That was subdivided into how many lots?

The Witness: Fourteen lots.

The Court: And who took title to that property?

The Witness: Orange Gardens.

The Court: When was it organized?

The Witness: In April, 1947.

The Court: That has already been given. Did you have a name for that development?

The Witness: Orange Gardens.

The Court: Did you testify these were all multiple dwellings? [165]

The Witness: Yes.

The Court: How many separate buildings were there?

The Witness: We have 11.

The Court: Are they all one-story affairs?

(Testimony of Edgar M. Cohn.)

The Witness: Two stories. That is an FHA 608 project.

The Court: In 1947 did you have to get priorities?

The Witness: No.

The Court: The war was over and you were able to go ahead in the usual way?

The Witness: Yes.

The Court: But you still got FHA loans?

The Witness: Oh, yes.

The Court: In 1947 did you do anything else besides the Orange Gardens project?

The Witness: It was continuous from 1946 under D & E Corporation.

The Court: What is the D & E Corporation?

The Witness: That is Daniel and Edgar Cohn and their wives.

The Court: D & E, when was that organized?

The Witness: That was organized in the early part of 1946.

The Court: Did it acquire real estate?

The Witness: It acquired real estate in 1947.

The Court: Where? [166]

The Witness: In the Hawthorne area.

The Court: What is the Hawthorne area?

The Witness: If your Honor is familiar with Inglewood, on the south end of town, Hawthorne is four or five miles outside of Inglewood on the extension of LaBrea Avenue.

The Court: What was that project? Did you get finished with that?

(Testimony of Edgar M. Cohn.)

The Witness: Yes, we built single family houses and finished them in 1947.

The Court: Finished them and sold them in 1947?

The Witness: Some in '46 and some in '47.

The Court: What happened to D & E Corporation?

The Witness: D & E Corporation in 1949 built 59 houses in Pacific Palisades which is at the end of Sunset Boulevard and the ocean. Those were single family houses which we built and sold.

The Court: You did sell them?

The Witness: Oh, yes.

The Court: Between 1947 and 1949 what did D & E Corporation do?

The Witness: It was inactive.

The Court: How many houses did you build in the Hawthorne area in 1946 and 1947?

The Witness: I believe 94.

The Court: How did these people report [167] their income?

Mr. Conroy: On the ordinary basis on the single family sales.

The Court: Do we have in the years here any transactions involving the Hawthorne area?

Mr. Conroy: Not in the taxable years, no, your Honor.

The Court: I would like to reach an end to my interjection of questions. I didn't intend that I ask as many questions as I have, but one has led to an-

(Testimony of Edgar M. Cohn.)

other. I am going to ask one more question to see if I can end this interruption.

I would like you to name, if you would, please, all the corporations, partnerships, sole proprietorships or any other type of business organization which you, alone, or your brother have any interest in or have been interested in since 1941 and through 1949. It seems to me that is the time area that has gotten into the case now.

Mr. Conroy: Do you want him to repeat what he has said or enlarge on it?

The Court: I am getting a complete list as of this point.

The Witness: Do you want me to state the names of the corporations and the amount of building, or just the name of the corporation? [168]

The Court: Just the name of the corporation, and you can go back and pick up the other information, or maybe counsel will inquire.

The Witness: Security Construction Company, Security Construction Co., Inc., Keswick Corporation.

Mr. Chehock: How do you spell that?

The Witness: K-e-s-w-i-c-k. Orange Gardens, D & E Corporation, Bonnie Brae Gardens, and our own personal residences, if you call that a business.

The Court: No. Now, the years in which these business concerns were active. You have named six.

The Witness: Yes. five corporations and one partnership.

(Testimony of Edgar M. Cohn.)

The Security Construction Company, 1942 to the present day. Do you mean in existence?

The Court: Yes, in existence.

The Witness: Security Construction Company, 1942; Security Construction Co., Inc., from 1941; D & E Corporation, 1946; Keswick Corporation, 1946; Bonnie Brae Gardens, 1947, and Orange Gardens, 1947.

I may be a year off on some of those, your Honor. I am giving them from memory.

The Court: The partnership organized in 1941 was active through 1946 and then became inactive, is that correct?

The Witness: The partnership was formed in 1942. [169] The corporation was formed in 1941.

The Court: 1942, and became inactive in 1946 as far as constructing houses. And remained inactive?

The Witness: Yes.

The Court: Keswick Corporation was organized in 1946. How long was it active?

The Witness: Active until 1948.

The Court: Orange Gardens was organized in 1947 and is that still active?

The Witness: Still active.

The Court: D & E Corporation was organized in 1947 and is still active?

The Witness: Still active.

The Court: Bonnie Brae Gardens was organized in 1947. Is that still active?

The Witness: It was active until 1950. If I may

(Testimony of Edgar M. Cohn.)

qualify that, it was 1951. And I would like to add another company to that list that had escaped me, the Construction Enterprises.

The Court: When was it organized?

The Witness: In 1951, and as a partnership which we have one-half interest.

The Court: What is that doing?

The Witness: It has concluded its operations. It was to build some houses in the Valley. [170]

The Court: Which valley?

The Witness: In the San Fernando Valley.

The Court: This is still in the year 1951?

The Witness: They were built and sold this year.

The Court: What was Bonnie Brae Gardens?

The Witness: Bonnie Brae Gardens built 46 apartment units in 1948.

The Court: Were they sold?

The Witness: They were sold in 1949 and 1950.

The Court: Where was that property located?

The Witness: In Los Angeles.

The Court: In what district?

The Witness: Near downtown, the Westlake district.

The Court: In the hill up there?

The Witness: No, the Westlake district is about three miles from here, near Alvarado and Sixth Street.

The Court: The Keswick Corporation, what property did they have?

The Witness: They built 12 apartment buildings in Toluca Lake, near Warner Bros. Studio.

(Testimony of Edgar M. Cohn.)

The Court: Were they sold?

The Witness: Yes, they were sold in 1947, '48 and '49.

The Court: The D & E Corporation had property in the Hawthorne area near Inglewood and built 84 units and sold [171] those 84 units when?

The Witness: In 1946 and '47; late in '46 and early in '47.

The Court: Then in 1949 it built 69 houses in Pacific Palisades. When were those sold?

The Witness: It built 59 houses in Pacific Palisades which were sold in 1950.

Mr. Chehock: Which corporation is that?

The Court: D & E Corporation.

Now, is Orange Gardens Corporation the only project where you have built apartments and held them for rent?

The Witness: No. Bonnie Brae Gardens built apartment units for rental and they were later sold, your Honor.

The Court: You have testified that Bonnie Brae project was 46 apartment units which were sold in 1949 and '50?

The Witness: Yes.

The Court: Do you mean they were rented until they were sold in the same way the property over here at Beautiful Glenwood was rented until it was sold?

The Witness: It was rented and then it was sold.

The Court: Just as an old Californian, I have seen many of these real estate projects grow in Cali-

(Testimony of Edgar M. Cohn.)

fornia, and, of course, the names were always of great interest. I think people like to live in a neighborhood that has a pretty name. [172] I think that is part of good salesmanship. I think in California we did have very attractive projects, so don't misunderstand me at all. I am very sympathetic with that part of the business.

What I mean when I say is Orange Gardens the only project where you built apartment units and held them for rental, I mean not for rental pending sale, but held them for rental.

The Witness: Yes.

The Court: Now, we have a complete picture of your little empire.

The Witness: Well, I didn't mention the fact that D & E Corporation built some more houses in 1950.

The Court: Where did it build these?

The Witness: In Redondo.

The Court: How many?

The Witness: 202 houses.

The Court: Were those sold?

The Witness: Those were sold.

The Court: When?

The Witness: In 1950 and '51.

The Court: They were rented pending sale?

The Witness: No, these were single family houses. All were sold and Orange Gardens built 124 houses in Redondo, single family houses, in 1950, all of which were sold in 1950. [173]

The Court: Can you think of anything else?

(Testimony of Edgar M. Cohn.)

The Witness: Yes. Security Construction Co., Inc., built 365 houses, single family houses in Hawthorne, an adjacent area to the south, in 1948 and 1949, all of which were sold. I think I have covered everything to the best of my recollection.

The Court: Mr. Conroy.

Q. (By Mr. Conroy): Mr. Cohn, the Court has asked you about whether Orange Gardens was the only property that was held for rental pending sale and I wanted to ask you——

The Court: I don't think that was the question. I asked him if Orange Gardens was the only place where they put up apartment units and held them for rent, not just for rent pending sale, but for rent not pending sale and the answer was yes.

The Witness: Bonnie Brae Gardens was put up for rent.

The Court: Do you still hold the property?

The Witness: The way I understood the question was whether those were the only apartments we owned at the present time.

The Court: I mean over the whole period. I want to distinguish between the buildings put up which you have held for rent and have not attempted to sell and didn't [174] put them up to be sold at a later date, but to get rental income until you sold them and from that question that Mr. Conroy asked you about Orange Gardens, I understood that Orange Gardens put up some apartment units in 1947 as rental property and that they were

(Testimony of Edgar M. Cohn.)

rented and have been rented until the present time and you still own the property.

The Witness: Yes.

The Court: In all of these other cases you constructed houses and apartments, single family houses and you put them on the market for sale immediately?

The Witness: Immediately.

The Court: Some of the apartment projects you rented them and then sold them?

The Witness: We rented them and later sold them.

The Court: Did you handle the Bonnie Brae renting property any differently than you handled the Orange Gardens?

The Witness: No.

The Court: Why did you sell the Bonnie Brae Gardens property?

The Witness: The explanation may seem peculiar to your Honor, but the tenants were driving me crazy. They were bothering me at all hours of the day and night and I just didn't have any peace whatsoever. In self-defense, I insisted that we sell it.

The Court: How are things going over in [175] Orange Gardens?

The Witness: At the present time, everything is going fine. They are 99 per cent occupied and everybody seems happy. We are not picking any oranges, however.

The Court: They are not set up the same way?

(Testimony of Edgar M. Cohn.)

The Witness: They don't know I am the owner. It is handled locally.

The Court: You have a rental agent?

The Witness: I have an employee who stays on the property and rents the apartments.

The Court: All right, Mr. Conroy.

Q. (By Mr. Conroy): You have, at some detail, stated the activity of those various corporations and the partnership. I would like to ask you about the Construction Enterprises. You stated that you and your brother owned 50 per cent of that. Is that the only enterprise you have been in in which you and your brother were not the sole owners? I am referring, of course, to other than the time your father was interested in the Security Construction Co., Inc.

The Court: Is that a clear question? What year did your father pass away?

The Witness: In November, 1945.

The Court: He could not have been interested in any of those. [176]

Mr. Conroy: I will withdraw the question and clarify it.

Q. (By Mr. Conroy): Now, the corporations that you have mentioned in answer to the Judge's questions, were they all owned entirely by you and your brother? A. Yes.

Q. Construction Enterprises is a co-partnership, one-half of which is owned by you and your brother and one-half by someone else? A. Yes.

Q. Who are the other partners?

(Testimony of Edgar M. Cohn.)

A. Jules Oakley and John Schmidt.

Q. How many houses did that co-partnership build and sell? A. 72 single family houses.

Q. They were built and sold in the same year?

A. In the year 1951.

Q. You have not filed an income tax return on those? A. No.

Q. You didn't hold them, you sold them as soon as they were completed? A. Yes.

Q. With reference to all of the single family residences that you built and sold, were they sold as soon as you could find a buyer at the completion? [177] A. To my best knowledge, yes.

Q. How long did you hold Bonnie Brae Gardens?

A. Approximately two years.

Q. What was the other one?

A. Keswick Corporation.

Q. How many apartments did it have?

A. It had 48 apartments in 12 different buildings.

Q. How long did you hold those?

A. I would say a year and one-half or two years.

Q. Did you rent them during all of that time?

A. Yes.

Q. Now, what was your reason for selling those?

A. I want to go back to the root question, if I may. Keswick Corporation had another stockholder.

Q. Who was that? A. Roger W. Salmon.

Q. Is he still a stockholder? A. No.

Q. When did he sell his interest?

A. As soon as we were able to sell the buildings.

(Testimony of Edgar M. Cohn.)

Because of some financial difficulty, he insisted that we should buy him out or sell the buildings and we were using our funds for other activities at the time and we agreed to sell the buildings.

Q. That was the reason for selling the buildings? [178] A. Yes.

Q. Have you built through D & E Corporation or any of the other corporations any single family houses other than what you have already testified to?

A. Do you mind if I use the paper for a computation? Did you say build or going to build?

Q. Did you build?

A. Do you mean under construction at the present time?

Q. All right.

A. I have a total of 345 in the D & E Corporation.

Q. In which corporation?

A. In D & E Corporation.

Q. That it has built and sold? A. Yes.

Q. That is its entire activities, is it, as far as houses already built and sold?

A. Well, it has under construction 80 houses in Northridge.

Q. In other words, you are still engaged also in the business of building and selling single family residences, is that right? A. Yes.

Q. Now, to summarize and give the totals here, which I think is important, did Keswick build any

(Testimony of Edgar M. Cohn.)

single family residences? [179] A. No.

Q. And I believe you said Orange Gardens built some single family residences? A. Yes.

Q. How many? A. I believe I said 124.

Q. Those were all built and sold? A. Yes.

Q. That is the entire activity of Orange Gardens, as far as selling houses and apartments, other than the apartments in North Long Beach?

A. Yes.

Q. Now, we have gone through D & E and Keswick and Orange Gardens. The next one would be Bonnie Brae. What did it build?

A. Three buildings consisting of 46 apartments.

Q. Did you build any single family residences?

A. If you mean as a contractor, no.

Q. No, I mean as an owner. A. No.

Q. That is the only activity of Bonnie Brae as far as building and owning?

A. No. It also was the contractor for the D & E Corporation for building the Construction Enterprise project in the Valley in 1951. [180]

Q. Now, do you have any other corporations that I have not mentioned?

A. The Security Construction Co., Inc., built 365 houses in 1948 and 1949 in Hawthorne, Lawndale and Torrance.

Q. You sold those as soon as you could?

A. Yes.

Q. Has it done anything else since that time in the way of building or selling houses or apartments? A. No.

(Testimony of Edgar M. Cohn.)

Q. It never did build apartments?

A. It never built apartments.

Q. Is there any other activity of the corporation I have not mentioned?

A. To the best of my knowledge you have our entire history.

Q. You have now testified to all of the construction work you have done to the best of your recollection? A. Yes, I have.

Mr. Conroy: I believe that is all.

The Court: You will have some questions, Mr. Chehock?

Mr. Chehock: Do you want to proceed now or later? I will take your suggestion on that.

The Court: I believe we will adjourn now until 20 minutes of 2:00 o'clock this afternoon.

(Whereupon, at 12:40 p.m., a recess was taken until 1:40 p.m. of the same day.) [181]

Afternoon Session—1:40 P.M.

The Court: You may proceed, Mr. Chehock.

Whereupon,

EDGAR M. COHN

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Recross-Examination

By Mr. Chehock:

Q. Mr. Cohn, will you state how many houses you have built through these corporations and part-

(Testimony of Edgar M. Cohn.)

nerships which you have constructed, and to which you have testified, for the period 1941 through 1951, both single and multiple houses?

A. Do you want me to count the multiple buildings, or the apartments as a unit? Do you want me to state the four-unit as four or one?

Q. I would count the apartment houses as one unless you want to designate it both ways. Either way is all right.

A. May I make a calculation? In regard to your question from 1941 through 1951, through the activities of the partnership and various corporations, we constructed 1,332 buildings, of which 1,225 buildings were single family residences and 107 buildings were built as multiple family residences.

A breakdown as to the 107 multiple unit [182] buildings reveals that there are 399 apartments in said buildings, counting each apartment as a unit and counting the single houses as a unit, we constructed a total of 1,624 units.

Q. Now, how many houses, either single or multiple, did either the corporations or partnership have on hand on January 1, 1952, that you had constructed during this 10-year period?

A. You are referring to multiple buildings?

Q. On January 1, 1952. You covered up through 1951, didn't you? A. Yes.

Q. At the end of 1951, how many houses, that you have constructed during that 10-year period that you have testified to, do you still have on end at the end of 1951?

(Testimony of Edgar M. Cohn.)

A. Eleven buildings consisting of 91 apartments.

Mr. Conroy: When you refer to '51, you are referring to the present date.

Mr. Chehock: I beg your pardon.

Q. (By Mr. Chehock): What did you figure?

A. I figured all the units—all the units that I counted are units that have been built by us, either sold by us or retained by us, up to the present date; nothing under construction up to now.

Q. Up to the present date your answer [183] is—— A. My answer is correct.

Mr. Chehock: That is all.

Mr. Conroy: No further questions.

The Court: Thank you, Mr. Cohn.

Mr. Conroy: If the Court please, Mr. Chehock and I would like to enter into an oral stipulation as to what Mr. Daniel Cohn would testify to if called as a witness.

If called as a witness, Mr. Daniel Cohn would testify he entered the United States Army on October 23, 1942; went to various training schools in the United States as required by the Signal Corps and the War Department. He entered active duty on September 23, 1943, and left the United States for overseas duty in India on February 12, 1944.

He returned to the United States on May 25, 1945, and served until discharged at the Santa Ana Base on October 29, 1945.

Mr. Chehock: I so stipulate, your Honor.

The Court: Thank you. You may proceed, Mr. Conroy.

Mr. Conroy: Mr. Wood, will you take the stand, please?

Whereupon,

HAROLD K. WOOD

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows: [184]

The Clerk: Please be seated. State your name and address for the record.

The Witness: Harold K. Wood.

The Clerk: What is your address?

The Witness: 1680 North Vine Street, Hollywood 28, California.

Direct Examination

By Mr. Conroy:

Q. What is your business or occupation?

A. Certified public accountant.

Q. How long have you been a certified public accountant?

A. My certificate is dated 1927.

Q. How long have you been in the accounting business? A. In public practice since 1924.

Q. Mr. Wood, have you taken care of the accounting and income tax matters for Daniel and Edgar Cohn and the Security Construction Company, a co-partnership, since 1944, during 1944 and '45 up to the present date? A. Yes.

Q. Did you take care of their income tax work before 1944?

(Testimony of Harold K. Wood.)

A. Yes. The first work I did for the Cohns was to file the corporation return of the Security Construction Co., Inc., for the year 1941, which was done in the spring of 1942.

Q. What was the first work you did for the Security [185] Construction Company, a co-partnership?

A. The first work I did was set up their original books at the time of formation in May, 1942.

Q. Have you taken care of their auditing and income tax work so far as the co-partnership is concerned? A. Yes.

Q. Have you also discussed with them their income tax problems? A. Yes.

Q. Mr. Wood, do you recall a conversation with Mr. Edgar Cohn in the first part of January, 1944?

A. Yes.

Q. Where did that conversation take place?

A. In my office.

Q. And what is the name of your firm?

A. Boyle & Wood.

Q. Who is your partner?

A. John M. Boyle.

Q. Was he your partner in 1942?

A. He has been since 1927.

Q. I show you Petitioners' Exhibit No. 19 and ask you whether you have seen that before?

A. Yes, I have.

Q. When was the first time you saw that?

A. Allowing for the passage of mail, it was [186]

(Testimony of Harold K. Wood.)

that passage of time after the date on the letter, January 12, 1944.

Q. Would it be a day or two after that date?

A. Not later than two days, January 14th.

Q. Did you have any discussion with Mr. Edgar Cohn concerning the contents of that letter prior to the time you received the letter?

A. Yes, I did.

Q. When and where did that take place?

A. In my office.

Q. Who else was present?

A. Nobody else.

Q. Will you please state what was said?

A. Edgar came in to see me that particular day to discuss the multiple apartment buildings which they had under construction. He stated to me that under the requirements of the National Housing Agency they were required to rent them for a limited period. He said they had been considering what the effect of that requirement would be and they had projected what the rental use might be expected to show if they held them, themselves.

He told me that he had discussed that, himself and his father, with Mr. John Biby, who, at that time, was their attorney. He said as the result of their projection and investigation they had decided that the buildings would make a good investment for them to hold. He told me that they [187] had decided not to sell the buildings, not to offer them for sale, but to hold them for investment.

Q. What did you say?

(Testimony of Harold K. Wood.)

A. I accepted the information and made notes on it and then asked them if they had considered what the affect on the over-all picture would be on income taxes. His statement to me was, "No, we don't intend to sell them. We are going to keep them for investment."

I said to him, "If you don't intend to sell them, something map happen in the future which may cause you to sell them anyway." And I explained the provisions of 117-J and explained that the capital gains provisions in Section 117-J did not apply to property held primarily for sale to customers in the ordinary course of business.

I advised that I wished a written letter from him stating that they had determined to hold the buildings for investment so that there would be no question about it in the future if sale occurred.

Q. Is that the substance of all the conversation you had on the subject? A. That is.

Q. On the income tax returns that were filed and prepared by you, it has been pointed out that the term "real estate" is contained after the word "occupation of taxpayer." Who placed that on the return? [188] A. I did.

Q. And did you have anything in mind as to what that term encompassed?

A. It is a general term that we use in all cases where the taxpayer is producing income from any of the various branches of real estate activity. It wasn't intended to describe any operation particularly other than in general.

(Testimony of Harold K. Wood.)

Q. It is just a general term?

A. Just a general term.

Q. Mr. Wood, I show you Respondent's Exhibit C which is the 1944 partnership return of the Security Construction Company. I will ask you whether or not you prepared that? A. I did.

Q. Does that indicate on there anywhere the income from rental of the property of the 69 buildings that we have been talking about in this case?

A. It does.

Q. How much? A. $92,437.20.

Q. Does it indicate the income from any other activities or all other activities?

A. It indicates the income from all other activities.

Q. How much is that?

A. There are three other items of income shown on the return. One is installments in the amount of $13,685.16. [189] One is miscellaneous income from a forfeiture of a deposit in the amount of $25.00. The other item is marked, "See Schedules attached," in the amount of $90,527.05 which represents all profits realized on sales of real estate.

Q. As profits realized for that year?

A. Profits realized or contained in principle payments received in that year, whether it had been on sales of that year or prior years.

Q. I believe that answers the question. Now, Mr. Wood, do you have the records here that would show the amount of advertising that was done by the partnership in 1945 and 1946?

(Testimony of Harold K. Wood.)

A. Yes, I have the books of the company.

Q. Could you get those books and state what the amounts were for those years?

A. In the year 1944 the total advertising expense of the Security Construction Company was $902.75. The same advertising is also shown on Page 3 of the partnership return of income for the year 1944, which is Respondent's Exhibit C.

Q. You have given us the advertising for the year '44. Will you go to '45 and '46?

A. I have not found the particular sheet, but the amount would show on Respondent's Exhibit D.

Q. Let me ask you this to save time: Have you checked the Respondent's Exhibits D and E——

A. Pardon me. I have just located the amount. In [190] the year 1945 the total advertising expense of the Security Construction Company was $34.66.

Q. Can you find 1946 advertising in the books?

A. From the books of the partnership the total advertising expense for the year 1946 was $17.60.

Mr. Conroy: You may cross-examine.

Cross-Examination

By Mr. Chehock:

Q. Referring to Exhibit A, Mr. Wood, will you state the eventual net profits from sales made by the partnership that year? When I say eventual, I mean the net profits, some of which are realized that year and some being on installment basis, but the net eventual profits. A. From sales of real estate?

(Testimony of Harold K. Wood.)

Q. From sales of real estate.

A. $15,035.21.

Q. That is made up of how much from installment sales and how much from closed and paid for fully in the year 1942?

A. From installment sales, the eventual profit is $13,628.13. From closed sales not on the installment plan, $1,407.08.

Q. Referring you to Exhibit B, will you state the eventual net profits from sales within 1943 from the partnership both from installment sales and fully paid for sales?

A. The total eventual profit from both installment [191] and closed sales made in the year 1943 would be $73,349.92.

Q. Breaking that down, it would be what?

A. Breaking that down in installment sales, the eventual profit was $70,516.84, and closed sales, $2,833.08.

Q. Referring you now to Exhibit C, will you first state to the Court if that is your work copy?

A. That is my work copy.

Q. Is there one sheet missing there?

A. The sheet which should show the details of installment and closed sales for 1944, and profit realized from 1944 collections on prior year installment sales is missing.

Q. That one that is missing was filed with the original return?

A. It was filed with the original return.

(Testimony of Harold K. Wood.)

Q. Well, now, from the books and records, have you worked out the correct figure as to what the eventual net profits from sales were in 1944, and, having done that, have you appended to your work-papers another sheet showing that?

A. Yes, I have.

Q. That is the first inserted sheet in the exhibit?

A. That is right. It appears on two sheets on an inserted light green schedule paper and on the reverse side of a yellow schedule which has been folded back.

Q. You have made some notations on [192] there? A. Yes.

Q. Will you state what the eventual net profit of sales of the partnership was in 1944, breaking it down?

A. In 1944 the total eventual profit on sales made in that year was $111.436.50. Of that, installment sales were $102,544.62. The closed sales were $8,891.88.

Q. For the year 1944 you also testified to some $92,000.00 in rental, is that right?

A. $92,437.20.

Q. Now, that rental figure, $92,000.00, is the gross rental figure before any expenses, is that right? A. That is right.

Q. Have you made a calculation as to what the net rental was in 1944?

A. Only on a projected basis. Not to apply to the year 1944, itself.

The Court: What do you mean by that?

(Testimony of Harold K. Wood.)

The Witness: The buildings were then rented on an average period of 14 months. The rental period occurred in two different years, part of it in 1944 and the balance in 1945. So that neither tax return represents a full year's operation without projection.

The Court: Would it be material to know simply what rents were received in 1944 and what rents were received in 1945? [193]

The Witness: Yes, we have the rents by themselves, but not the application of expenses which may have benefitted both rental properties and sold properties, such as, salaries, office expense, telephone——

The Court: You ought to be able to allocate the expenses on some basis. The Court knows what the net income from rentals was in each year. I think I would attempt to figure that out myself.

The Witness: I could, of course, figure it if I had a long enough opportunity, but it means going back to original records. I can approximate it from my general knowledge.

The Court: What is the point there? I don't quite understand what is involved in projecting the expenses and receipts into an annual period. Does the partnership keep its returns on the calendar year?

The Witness: Yes.

The Court: And in the income tax returns all gross income was reported and all expenses were deducted?

(Testimony of Harold K. Wood.)

The Witness: That is right.

The Court: And among the expenses deducted you had expenses that applied to the rented property as well as to other property, is that right?

The Witness: That is right.

The Court: And you didn't on the books do [194] any cost accounting of allocating any parts of the expenses to the houses that were rented—I think there were 69 units rented, is that right?

The Witness: 69 buildings and we didn't—we may have the units somewhere, but it was 69 buildings. I think I can explain this to the satisfaction of everybody concerned, possibly.

The Court: I think I understand why the situation is as it is. I would like to know what the net income from rent was in each year.

The Witness: Could you spare a minute or so?

The Court: Certainly. Do you just want to think about it?

The Witness: No, I would like to testify.

The Court: I thought maybe you could make some calculations and then testify later.

The Witness: I can testify equally well at the moment.

The Court: I want to ask a question about something else. Do you have other witnesses?

Mr. Conroy: No.

The Court: This is the last witness?

Mr. Conroy: Yes.

The Court: And it all depends on the cross-examination? [195]

(Testimony of Harold K. Wood.)

Mr. Conroy: Yes.

The Court: I would think we should finish about 3:00 o'clock. Are you going into very much on cross-examination?

Mr Chehock: No, it probably will be very short, if we take a recess for a few minutes.

The Court: Very well.

(Short recess taken.)

The Court: You may go ahead.

Q. (By Mr. Chehock): Mr. Wood, referring you again to the year 1944, can you state, approximately, what the gross rental income and net rental income is and how you went about computing it for the partnership that year?

A. For the year 1944 the gross rental income is $92,437.20. The approximate net rental income is $61,100.00.

Q. Will you explain to the Court what you have done in computing that?

A. This is determined from an approximate segregation of each major item of deductible expense as it would affect rentals or other activities of the business.

Q. Will you be more specific and state what your breakdown is?

A. The $61.100.00 net income for rental indicates an expense of $31,310.00, approximately. That amount is [196] made up of office salaries, office expense of $6,500.00, which is approximately half of the total expense for that item on the return.

(Testimony of Harold K. Wood.)

Interest against rentals in the amount of $28,000.00, which is more than half of the interest charged on the return.

Taxes in the amount of $7,200.00 out of a total of $8,083.00.

Depreciation, $16,451.15, the entire amount.

Repairs and maintenance of rental buildings, $8,488.50, the entire amount.

Insurance, $1,750.00, out of the total of $5,313.00.

The other items which I have not attempted to segregate are advertising, commissions, legal and accounting, telephone and telegraph and automobile expenses. The segregation of those items of expense between rental activity and sales activities would depend on closer knowledge than I have of that year.

Q. You have not put anything in on that as a rental deduction?

A. I allowed an arbitrary $500.00. However, there would not be as much of that allowed to rentals as there would to other joint expenses like salaries, taxes and things of that nature.

Mr. Conroy: So that the record can be straight, what is the total of the items that he didn't allocate? [197]

The Witness: Less than $8,000.00.

Mr. Conroy: Mr. Wood, I believe your calculation is wrong. You have $28,000.00 as interest and $16,000.00 depreciation. That, alone, would be over $31,000.00.

(Testimony of Harold K. Wood.)

The Witness: That is right. A CPA and I can't add.

Q. (By Mr. Chehock): Will you start all over, again, for the year 1944 and state the total expenses that you have apportioned as an offset against the gross rental income?

A. The total expense for the year 1944 should be $68,309.65, instead of the figure of $31,309.00, approximately, that I gave before. That would leave a net of $24,128.00.

Q. Rental income?

A. Yes. Against $61,100.00, approximately, given before.

Q. So your apportionment for the net rental income in 1944 is $24,128.00, is that right?

A. That is right.

Q. Coming to the year 1945, Exhibit D, I will refer to you Exhibit D and ask you if you will first state what the eventual net profit from sales was in that year?

A. If I might refer to the schedule which I have with me, it would save time.

On sales in the year 1945 eventual profit on installment sales is $238,329.85. In addition to that, there is $681.31 on a resale made in 1945 of a repossessed single [198] family residence which had been first sold previously.

Q. On Exhibit D, which is 1945 partnership return, there are a number of schedules, the last two of which—will you state to the Court what they are? Just describe the last two schedules.

(Testimony of Harold K. Wood.)

A. The first of the last two schedules is headed, "1945 Installment Sales of Capital Assets, Long Term." It shows for 56 lots in Tract 13170 and 13 lots in Tract 13171——

Q. Those sales so indicated on this sheet are the sales that are in controversy here in this case, is that not true?

A. That is right. The next schedule, which is the last schedule attached to the return, is the schedule showing depreciation claimed against rental received in the year 1945 on each of the 69 buildings in controversy.

Q. These two schedules, these last two appearing on this Exhibit D show pretty much the entire statement of the contract price, net selling price, expense of sale, mortgage, net cost and total contract price and eventual profits; the date that the buildings were completed and the date sold, is that not true? A. That is true.

Q. Now, referring, again, to Exhibit D can you state the gross rental income for that year and then your allocation of what the net rental income would be for that year?

A. The gross rental income for the year 1945 is [199] $45,841.07. The total approximate deductions for expense against those rentals is a total of $40,009.86. That is made up of office salaries, $1,725.00, being half the total amount;

Interest in the amount of $18,506.29, being the entire amount;

Taxes of $204.71, being the entire amount;

(Testimony of Harold K. Wood.)

Depreciation of $9,845.34, the entire amount;

Repairs and maintenance of rental property, $8,128.52, being the entire amount;

Insurance, $1,100.00 out of a total amount of $1,202.45.

I further allocated $500.00 to cover rental activity proportions of miscellaneous items which total approximately $4,200.00.

Q. So with the gross rental of $45,741.07 and the total allocable expenses of $40,000.00, it would leave a net rental income for 1945 of how much?

A. $5,831.21.

Q. Referring you now, Mr. Wood, to Exhibit E, which is the 1946 partnership return of the Security Construction Company, will you state what the eventual net profits from sales were that year?

A. The total eventual profit of the sales made in the year 1946 is $68,453.26.

Q. How much in installment sales and how much from other [200] sources?

A. Of that total installments is $64,835.01, while closed sales were $3,618.25.

Q. Looking at your return on Point 25, wasn't that the sale of vacant lots?

A. That was the sale of vacant lots which had not been improved.

Q. Do you know what vacant lots they were?

A. I do.

Q. State what they were.

A. There were two which could not be utilized in Tract 13172 at the time one block of single family

(Testimony of Harold K. Wood.)

residences were constructed because they were being used by the Army as gun implacements. When the Army released them from the use of gun implacements, it was not thought wise to utilize the lots to construct buildings, so they were sold as unimproved lots.

Lot 214 is a lot which was bought with the intention of improving and abandoned for that purpose. The same thing is true of Lot 106 in Lawndale. The last item, which says, "Pasadena Avenue Lots," is some lots which were bought with the ones which were built on in Pasadena but for which the City of Pasadena refused to issue building permits as the City of Pasadena wanted to use them.

The Court: Was there any rental income in [201] the year 1946?

The Witness: Yes, there was rental income shown on the return of $745.00.

Q. (By Mr. Chehock): Do you know what that is?

A. Approximately $100.00 or so of it is rental for the small building which was rented to Eddy D. Field, beginning, as I recollect, in October of that year.

Q. Did Eddy D. Field or McKee pay rental in 1945? A. They did.

Q. Those questions were asked of Mr. Edgar Cohn and I think he wasn't quite positive. Can you state in the record whether or not Social Security payments were deducted or Withholding taxes with-

(Testimony of Harold K. Wood.)

held from any amounts paid to Cochrane, Burdette, Hotaling, Field, McKee or any real estate agent?

A. There was neither Social Security withheld nor Income Tax deducted.

Mr. Chehock: That is all.

The Court: Perhaps Mr. Conroy will have a few questions.

Mr. Conroy: Yes.

Redirect Examination

By Mr. Conroy:

Q. In allocating these expenses for the year 1945, did you attempt, in looking at the income tax return, to [202] allocate that by the determination of the length of holding each property during the year?

A. Do you mean now? I had to do it in a very general way.

Q. Did you take into consideration the period of holding of the properties during the year 1945 to which you allocated the expense?

A. Not accurately.

Q. Well, for example, you have interest of $28,000.00, haven't you?

A. That is the year 1944, Mr. Conroy.

Q. What do you have for the year 1945?

A. In the year 1945 I show interest of $18,500.00.

Q. How much is that altogether?

A. That is a total of $46,506.00.

(Testimony of Harold K. Wood.)

Q. I believe your testimony is that the buildings were held a total of 14 months on an average?

A. That is true, but in the year 1944, before rentals began, there was interest on the buildings which were rented prior to their completion and that figure allocated their rents on a full year's interest.

Q. Now, in determining interest of $18,500.00 for the year 1945, did you consult any schedule of dates of sales of property to determine how accurate you would be?

A. At this time I did not. [203]

Q. If it were called to your attention that of the 69 buildings, only about 12 of them were sold after the middle of the year and some of them as early as January, would you think it would make any difference? I would like to get a little more accurate statement.

A. It would certainly make a difference, because allocations of years 1944 and 1945, each year earning a fractional part of the total rental period, the sum of those two would not produce a fair showing for a year's rental activity if all the properties were rented for one year without interruption, without loss of income, without added expense.

Q. I know you weren't prepared to answer these questions off the cuff and without reflecting upon the accuracy of your testimony. I am wondering whether it would be possible to take some time and give the figures with more accuracy.

A. I would not care to undertake it to an ac-

(Testimony of Harold K. Wood.)

curate point without plenty of time to work it out.

Mr. Chehock: Is it all right with the Court to give the witness some time? I realize I did ask some questions that would take some time.

The Witness: I might also add, in explanation, that the detailed records were not maintained by me at that time, and a great deal of the determination as to where an [204] item belonged would depend on detailed original records or knowledge of what occurred at the time. The man who did the work is not now available.

Mr. Conroy: The reason I bring this up, I note the $46,000.00 in interest charges appears to be incorrect; for a period of 14 months it would not be $18,000.00, it would be $28,000.00. It appears that the figures given by Mr. Wood are subject to considerable correction. I would like to have those figures, if they are going to be considered by the Court, a little more accurate.

I realize we have Mr. Edgar Cohn's testimony, but I am wondering this: In order to answer your question and to have this evidence available, is it possible to arrive at a reasonably accurate figure—and it will take time—if he could, in the next couple of days, work that out and maybe you would be willing to stipulate if he and Mr. Wilke could go over it and it could be introduced into evidence.

Mr. Chehock: It is agreeable with me if it is all right with the Court to have him take a couple of days and then come in for about 15 minutes some morning and present it.

(Testimony of Harold K. Wood.)

The Court: I can keep the record open to receive another exhibit, but I don't think I am going to have time to hear any more of this case. When we leave this case, we will get into some long trials. If I could, I would, of course, but I don't believe I could agree to that. [205]

Mr. Conroy: Would it be satisfactory with your Honor if we could have Mr. Wilke and Mr. Wood try to arrive at an allocation in answer to the net income for these two years, and if they can do so, keep the record open for the acceptance of another exhibit?

The Court: Yes.

Mr. Chehock: We will try to do that.

Mr. Conroy: I have no further questions of Mr. Wood.

Mr. Chehock: That is all.

The Court: Thank you, Mr. Wood, you are excused.

(Witness excused.)

Mr. Conroy: The Petitioner rests.

Mr. Chehock: The Respondent rests.

We would like permission to withdraw the exhibit.

The Court: That is always allowed. You may take that up with the Clerk.

Read the dates of the briefs.

The Clerk: Original briefs due on January 21, 1952. Reply briefs due February 11, 1952.

Mr. Chehock: Your Honor——

The Court: I know what you are going to say and we will let the dates stand but briefs are always received late——

Mr. Chehock: I was going to suggest that we have simultaneous briefs and give us both more time. [206]

The Court: These are simultaneous briefs. Your suggestion was you would like to have simultaneous rather than consecutive. These are simultaneous.

The first brief of each party is due on January 21 and the reply brief is due February 11. Is that right?

The Clerk: Yes.

The Court: If you will want more time on your reply brief, we can make it February the 18th.

Mr. Chehock: We have a calendar coming up in February and I am not sure whether I can get it in by that time, your Honor, but we will try.

Mr. Conroy: I would appreciate February the 18th and if counsel has no objections to it——

The Court: We will make the reply brief due on February the 18th. I hope you won't have to ask for extensions of time on all of the briefs. You may have to ask for some. I hope to be able to take the case up and decide it soon after your briefs are in, and if I keep extending the time on briefs, I will probably be delayed in taking up the case.

Mr. Chehock: I wonder if the court reporter could give us any idea when we will get the transcript?

The Court: You will get it very quickly, I believe.

How many cases do you have on my calendar?

Mr. Chehock: I have one case. One case that has [207] not been billed and another calendar coming up.

The Court: What other case?

Mr. Chehock: No other case for trial on this calendar.

The Court: Do the best you can with that.

Mr. Chehock: Very well.

The Court: That concludes the trial of this proceeding. Give the Clerk the receipts for any exhibits you need for withdrawal and the hearing is concluded. If you work out something with Mr. Wood to clarify his testimony, and if it is to be put in in the form of an exhibit, come in some morning and we will receive that exhibit. If you want me to hear any more testimony of Mr. Wood, I will do that, and you can get in touch with the Clerk so that we can find a way of working it in conveniently.

Mr. Conroy: Thank you, your Honor.

The Court: If I had known you were going to run your time this well, I would not have needed to caution you this morning. You never know when it is necessary to consider time and when it is not necessary.

That will be all in this case.

(Whereupon, at 2:50 o'clock p.m., Thursday, December 6, 1951, the hearing in the above-entitled matter was closed.) [208]

December 10, 1951

The Court: I believe we kept the record open in this case for another exhibit, and I understand counsel agreed to submit the exhibit on stipulation.

Mr. Conroy: That is correct, your Honor.

Mr. Chehock: That is correct.

The Court: The stipulation is received, and that closes the record, I believe.

Mr. Conroy: That is right, your Honor.

State of California,
County of Los Angeles—ss.

Reporter's Certificate

I, Virginia K. Pickering, Reporter pro tempore of The Tax Court of the United States, Division 13, under its reporting contract, Do Hereby Certify:

That as such reporter I was present in Division 13 of the above-entitled Court, in session in the City of Los Angeles, on Thursday, the 10th day of December, 1951, and then and there took verbatim stenotype notes of all testimony, colloquy, statements, and every matter constituting the proceedings on the above date in the case of Alice E. Cohn, et al., Petitioners, Docket Nos. 25600, etc., fully, completely, and accurately, to the best of my ability, and that my stenotype notes are full, complete, and accurate.

That the foregoing transcript, consisting of pages numbered 210 to 211, both inclusive, contains a

complete, true, and correct transcription of my said stenotype notes so taken as aforesaid, and a full, true, and correct statement of the testimony given and of all of the proceedings had upon the trial of the above-entitled proceeding, to the best of my knowledge and ability.

Date: January 15, 1952.

/s/ VIRGINIA K. PICKERING.

[Endorsed]: Filed January 4, 1952.

[Title of Tax Court and Cause.]

Docket Nos. 25600, 25601, 25602, 25603

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 30, inclusive, constitute and are all of the original papers and proceedings, excepting Petitioner's exhibits 1 through 23 and Respondent's exhibits A through S, which are separately certified and forwarded herewith, on file in my office as the original and complete record in the proceedings before The Tax Court of the United States in the above-entitled proceedings and in which the petitioners in The Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 28th day of January, 1954.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 14221. United States Court of Appeals for the Ninth Circuit. Alice E. Cohn, Marion A. Cohn, Daniel E. Cohn and Edgar M. Cohn, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed February 2, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14221

ALICE E. COHN, MARION A. COHN, DANIEL E. COHN, EDGAR M. COHN,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL AND POINTS UPON WHICH APPELLANTS RELY

I.

The Appellants adopt the Designation of Contents of Record filed by them in the Tax Court as their designation of the contents of record in the above-entitled Court.

II.

The points upon which the above-named Appellants will rely on appeal are:

1. The Tax Court erred in determining deficiencies in income tax against the Appellant, Alice E. Cohn, for the calendar years ended December 31, 1945, and December 31, 1946, in the amounts of $6,810.12 and $1,835.48, respectively.

2. The Tax Court erred in determining deficiencies in income tax against the Appellant, Marion A. Cohn, for the calendar years ended December 31,

1945, and December 31, 1946, in the amounts of $18,-468.73 and $1,967.24, respectively.

3. The Tax Court erred in determining deficiencies in income tax against the Appellant, Daniel E. Cohn, for the calendar years ended December 31, 1945, and December 31, 1946, in the amounts of $23,-018.25 and $1,198.96, respectively.

4. The Tax Court erred in determining deficiencies in income tax against the Appellant, Edgar M. Cohn, for the calendar years ended December 31, 1945, and December 31, 1946, in the amounts of $8,051.34 and $1,088.21, respectively.

5. The Tax Court erred in determining that the gains from the sales of sixty-nine apartment buildings owned by the partnership, Security Construction Co., constituted ordinary income and were not subject to treatment as capital gains.

6. The Tax Court erred in finding that the sixty-nine apartment buildings sold in 1945 by the Security Construction Co. were held primarily for sale to customers in the ordinary course of business.

7. The Tax Court erred in finding that Orange Gardens, a corporation, owned by Daniel E. Cohn and Edgar M. Cohn, built and retained only eleven apartments in the Long Beach area which are still rented, and in failing to find that said corporation owned and continuously rented ninety-one apartments.

8. The Tax Court erred in finding that the renting of the sixty-nine apartment buildings by Appellants was only incidental to selling them.

9. The Tax Court erred in finding that the sixty-nine apartment buildings were rented only until it was profitable to sell them.

10. The Tax Court erred in finding that the Appellants did not in 1944 or 1945 engage in the business of renting residential property for investment.

/s/ EDWARD L. CONROY,
Attorney for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed March 3, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION THAT CERTAIN DOCUMENTS MAY BE OMITTED FROM THE RECORD ON APPEAL

It Is Hereby Stipulated by and between the parties hereto, by and through their respective counsel, that except for differences in the amounts involved (which amounts are separately set forth in the Findings of Fact, Opinion and Decision of the Tax Court) all of the facts involved in Tax Court actions Nos. 25600, 25601, 25602, and 25603 are identical; and in the interest of shortening the record on appeal, the following-named documents in Tax Court actions Nos. 25600, 25601, 25602 may be omitted and for all purposes of the appeal the Court may consider the similar documents in No. 25603 as applicable to Nos. 25600, 25601 and 25602:

1. Docket Entries Nos. 25600, 25601 and 25602;

2. Petitions in Nos. 25600, 25601 and 25602;

3. Answer in Nos. 25600, 25601 and 25602;

4. Petition for Review in Nos. 25600, 25601 and 25602;

5. Proof of Service of Petition of Review in Nos. 25600, 25601 and 25602;

6. Supplementary Stipulation of Facts dated December 10, 1951, and Exhibit A attached thereto.

And the Clerk of the above-entitled Court is hereby authorized and requested to omit the above-listed documents from the record on this appeal.

It Is Further Stipulated that there may be omitted from the record on appeal Appellee's Exhibits A, B, and C, being the tax returns of the partnership, Security Construction Company, for the years 1942, 1943, and 1944, and Exhibits F, G, I, J, K, and M being the individual income tax returns of the Appellants, Daniel E. Cohn and Alice E. Cohn, and Marion A. Cohn for the years 1945 and 1946 and the Court may consider the similar individual income tax return of Appellant Edgar M. Cohn for the years 1945 and 1946 being Exhibits H and L for all purposes of the appeal.

Dated: March 12, 1954.

/s/ EDWARD L. CONROY,
Attorney for Appellants.

/s/ H. BRIAN HOLLAND,
Attorney for Appellee.

[Endorsed]: Filed March 23, 1954.

No. 14221.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALICE E. COHN, MARION A. COHN, DANIEL E. COHN, and EDGAR M. COHN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

EDWARD L. CONROY,
1680 North Vine Street,
Los Angeles 28, California,
Attorney for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Argument 20

I.

The Tax Court's decisions are founded upon the mistaken concept and interpretation of Section 117(j) of the Internal Revenue Code. The interpretation of the Tax Court does violence to the intent and purpose of Congress in enacting that section in that it treats a decision of a taxpayer to sell his property, held for investment, as constituting a change of purpose from holding for rental and investment to holding for sale 20

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V.

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No. 14221.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALICE E. COHN, MARION A. COHN, DANIEL E. COHN, and EDGAR M. COHN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' OPENING BRIEF.

JURISDICTION OF THIS COURT.

The Petitioners are residents of the Southern District of California and duly filed their income tax returns for the calendar years 1945 and 1946 with the Collector of Internal Revenue for the Los Angeles District of California, all within the jurisdiction of this Court.

The petitions for review by this Court were filed pursuant to Sections 1141 and 1142 of the Internal Revenue Code to review the decisions made by the Tax Court of the United States (21 T. C. 11), sustaining the determination of the Respondent, who had determined defi-

ciencies for the calendar years 1945 and 1946 in the following amounts:

Alice E. Cohn	1945	$ 6,810.12
	1946	1,835.48
Marion A. Cohn	1945	$18,468.73
	1946	1,967.24
Daniel E. Cohn	1945	$23,018.25
	1946	1,198.96
Edgar M. Cohn	1945	$ 8,051.34
	1946	1,088.21

[T. 45-48].

NATURE OF THE CASE.

Petitioners Daniel E. Cohn and Edgar M. Cohn are, and were at all times herein mentioned, partners, and as such owned and operated Security Construction Company. The Security Construction Company was, at all pertinent times, engaged in the Los Angeles area in the dual trade or business of building and renting multiple family houses for investment and of building and selling single family houses. During the year 1945, Security Construction Company sold 69 apartment buildings, all of which had been rented for more than six months and had been used in its business of renting houses for income and investment purposes. For income tax purposes the partnership treated the gains so derived as gains from sales of capital assets held for more than six months. The Commissioner of Internal Revenue treated the gains as ordinary gains and determined that there were deficiencies in respect to Petitioners' income taxes for 1945 and 1946. The Tax Court sustained the Respondent in this determination, and the Petitioners filed with this Court petitions to review the decisions of the Tax Court.

STATEMENT OF FACTS.

A written stipulation was entered into by Petitioners and Respondent and filed with the Tax Court stipulating the following facts to be true:

Stipulated Facts.

1. The partnership, Security Construction Company was formed on May 21, 1942, and the partners have at all times been Edgar M. Cohn and Daniel E. Cohn. Marion A. Cohn is and was during the entire years 1945 and 1946 the wife of Edgar M. Cohn. Daniel E. Cohn and Alice E. Cohn were married June 5, 1945, and have at all times since been husband and wife. Edgar M. Cohn and Daniel E. Cohn are brothers.

2. Tract No. 13172 in the City of Los Angeles, California, was acquired by the partnership by deed dated May 25, 1942, as acreage, and was subdivided by the partnership on August 26, 1942, into 132 lots. In the latter part of 1942 and the early part of 1943 the partnership built 130 single-family residences in said tract. Twenty-one of said residences were sold in 1942 and 109 were sold in 1943. The profits on said sales were reported for Federal Income Tax purposes as ordinary income and taxes were paid on that basis.

3. Tract No. 13710 in the City of Los Angeles, California, containing 56 lots, numbered 1 to 56, inclusive, was subdivided on September 27, 1943, and the partnership acquired said subdivided tract by deed dated September 28, 1943.

4. Tract No. 13171 in the City of Los Angeles, California, containing 122 lots, numbered 1 to 122, inclusive, was subdivided on January 19, 1944, and the partnership acquired said subdivided tract by deed dated January 21, 1944.

5. The partnership constructed 56 multiple-family apartment buildings in Tract 13170, one on each of the 56 lots. Twenty-three of these were four-unit apartment buildings and 33 were two-unit apartment buildings. The buildings constructed on Tract 13170 were completed as follows:

Lot Nos.	Date Completed
24-39 inc.	2/14/44
40-56 inc.	3/ 8/44
14-23 inc.	3/28/44
1-13 inc.	4/25/44

6. In about March, 1944, the partnership commenced the construction of 13 four-unit apartment buildings and 109 single-family residences on Tract 13171. The 13 apartment buildings were completed by June 14, 1944 and the single-family residences by September 1, 1944.

7. The 109 single-family residences in Tract 13171 were sold from July to September, 1944, and the profits on said sales were reported for Federal Tax purposes as ordinary income and taxes were paid on that basis.

8. Depreciation was claimed on the said apartment buildings in the Federal Income Tax Returns filed by the partnership for the years 1944 and 1945 at the rate of 4% per annum.

9. The 69 apartment buildings referred to in paragraphs 5 and 6 above were sold during the calendar

year 1945, between January 16 and October 31, inclusive. These 69 apartment buildings were located on Lots 1 to 56, inclusive, in Tract 13170, and Lots 110 to 122, inclusive, in Tract 13171. These sales were reported by the partnership in its 1945 partnership income tax return on the installment basis, as long-term capital gains. The Commissioner has determined the profits from such sales taxable as ordinary income.

10. The partnership built two duplexes and 14 single-family residences in Pasadena. Construction of said buildings was started in about July, 1945, and the buildings were completed during the first three months of 1946, and were sold in February and March, 1946. The profits on said sales were reported for Federal Income Tax purposes as ordinary income and taxes were paid on that basis. [T. 53-55.]

At the conclusion of the trial a supplementary stipulation of facts was entered into by the parties [T. 55a to 55f], the full extent of which we do not believe necessary to set forth herein. The pertinent facts stipulated were:

Security Construction Company received gross rental income from the 69 apartment buildings in 1944 of $92,437.20 and net income from said rentals of $28,793.84 [T. 55b and c]. The Tax Court so found [T. 27]. For 1945 the gross rental income of the partnership was $45,841.07 and the net rental income was $8,425.32 [T. 55d and e]. This was also found to be true by the Tax Court [T. 30]. It was further stipulated that the partnership took depreciation on its income tax return for 1944 of $16,271.30 and for 1945 in the amount of $9,815.00, or total depreciation during the holding of

said property for rental purposes of $26,086.30. These depreciation figures also appear in the 1944 and 1945 income tax returns of the partnership [T. 110 for 1944; T. 119 for 1945].*

Facts Established by the Evidence.

Petitioner Edgar M. Cohn testified that he was in the "real estate business with the construction of buildings for sale and for investment" [T. 214] and that he had been in the real estate business since 1941 with his brother, Daniel E. Cohn [T. 214]. The partners were in constant communication with the Federal Housing Administration in 1943 to determine if priorities were available in the area of their activity, and when they learned, in the summer of 1943, that there were 1,000 units programmed in the area in which they were interested, they talked to an official of the F.H.A. concerning the building of buildings on Tract 13170 [T. 215]. They were advised by F.H.A. that in order to obtain priorities they would have to construct multiple residence buildings [T. 215-216]. On July 17, 1943, they received priorities for the building of 56 multiple residence buildings containing 158 rental units on Tract 13170 [Pet. Ex. 7; T. 72] priorities for the remaining 13 multiple dwelling buildings were granted December 17, 1943. Construction was started on the 56 buildings about October 1, 1943 [T. 216]. Construction on the 13 apartment buildings was started in about March, 1944. Construction of the 69 buildings was completed at varying stages between February 14, 1944

---

*The 1945 income tax return shows depreciation on the rental property in question of $9,789.93 and the written stipulation shows it to be $9,815.00, or a difference of $25.07.

and June 14, 1944 [Stipulation of Facts]. At the time applications for these priorities were made, the partners intended to sell the buildings when completed. In the latter part of December, 1943, after having consulted with their attorney and one of the officials of the Glendale Federal Savings and Loan Association, they determined to change their purpose of holding the buildings for sale to holding them for rent and investment [T. 217-219]. As we consider the evidence on this point to be very important we set forth below the testimony establishing the said change and the reasons therefor:

(Testimony of Edgar M. Cohn):

"Q. At the time that you got the application for these priorities and started construction of those buildings, what [39] did the partnership intend to do with the buildings? A. We intended to sell the buildings.

Q. Did the time come when the partnership arrived at any other determination? A. Yes.

Q. When was that? A. December, 1943.

Q. And in December, 1943, what determination did the partnership make? A. The partnership made the determination to hold the buildings for investment and rent the apartments.

Q. Where was your brother, Daniel, at that time? A. In December, 1943, Daniel was in the Armed Forces of the United States.

Q. And you were running the partnership business? A. Yes.

Q. Your father was assisting you? A. He was advising me.

Q. All right. Did you discuss this question of holding them for investment with anyone other than your father? A. Yes.

Q. Who did you discuss it with? A. With Mr. Hollingsworth of the Glendale Federal Savings & Loan Association.

Q. When did you first discuss the matter with him? [40] A. In December, 1943." [T. 217.]

"Q. What was his advice to you? A. His advice to us was that through the medium of depreciation we would receive tax free income and could use that income to pay off the obligation that we had placed on the buildings, and thereby create an estate.

Q. Did he tell you you should hold it for investment purposes? A. Definitely, yes.

Q. Did you discuss that question with anyone else? A. With John E. Biby, our attorney.

Q. Where and when did that conversation take place, approximately? A. That conversation took place at Mr. Biby's home the last week in December of 1943.

Q. Who was present? A. My father, Max Cohn, Mr. Biby and myself.

Q. What advice did Mr. Biby give you with reference to that?

Mr. Chehock: What time was this?

Mr. Conroy: The last week of December, 1943. That is his testimony.

The Court: You may answer the question.

The Witness: He advised my father and myself to hold the buildings for investment [41].

Q. (By Mr. Conroy): Did you figure what the net income would be, with Mr. Biby? A. Yes. We had quite a discussion with Mr. Biby and we deter-

mined that the net income would be approximately $43,000.00 or $44,000.00 or approximately 12½ per cent return on the cost of the buildings." [T. 218.]

"Q. And did you talk to anyone else concerning the subject? A. Yes.

Q. Who else? A. Mr. Harold K. Wood.

Q. When did you talk to him? A. Shortly after the first of the year. I would say early in January in 1944.

Q. Where did you talk to Mr. Wood? A. At Mr. Wood's office.

Q. What discussion did you have with him concerning that subject? A. We discussed the advisability of holding the buildings for investment purposes. Mr. Wood advised us as to that fact and insisted that—

Q. Don't say 'insisted.' Tell us what he said. A. He said that I should write him a letter advising him that the partnership had decided to hold the buildings [42] for investment purposes.

Mr. Conroy: Mr. Chehock, I think you have seen a copy of this letter.

Mr. Chehock: Yes.

Q. (By Mr. Conroy): Mr. Cohn, I show you a letter dated January 12, 1944, signed by Edgar M. Cohn. Is that your signature? A. That is my signature.

Q. For what purpose was that letter written? A. It was written to advise our accountant, as per his request, that we were engaged in holding these buildings for investment purposes and to set them up on the books for that purpose." [T. 219.]

The said letter from Mr. Cohn to Mr. Wood was introduced into evidence and marked Petitioners' Exhibit 19 [T. 220-221]. Copy of said letter is as follows:

"Security Construction Company
Developers of Beautiful Glenwood
7801 Glen Oaks Boulevard
Burbank, California
STanley 7-3536

January 12, 1944.

Boyle & Wood,
Taft Building,
Hollywood, California.

Gentlemen:

We are now building fifty-six buildings consisting of thirty-three doubles and twenty-three four family dwellings in Tract 13170, City of Los Angeles, within three-quarters of a mile from Lockheed Aircraft Corporation.

During the past three years we have built 200 single family dwellings, all of which we sold and are now occupied by war workers.

After due and careful consideration, and in view of the fact that we are now engaged in building rental units, we have decided to rent all of the 158 units in the 56 buildings now under construction and hold same for investment purposes.

Respectfully yours,

Security Construction Company,
By /s/ Edgar M. Cohn,
Co-Partner."

EMC/DC
[Pet. Ex. 19; T. 220-221.]

The testimony of Radcliffe Hollingsworth, vice-president of Glendale Federal Savings & Loan Association, who had been connected with that organization for 17 years [T. 236], with reference to the determination of the Cohns to hold the buildings for rental, was as follows on direct examination:

"Q. Mr. Hollingsworth, did you ever discuss with Mr. Edgar Cohn and his father, Max Cohn, in the year 1943, the question of holding the multiple houses in those tracts for investment purposes? A. Subsequent to the application for the priorities, which of course was out of our hands—the priorities had to be obtained by the contractors themselves. Once having received the priorities, they were in a position to request commitments from the Federal Housing Administration for the purposes of building the structures involved.

At the very inception it was my advice that, through the medium of depreciation, it would be possible to build up an estate through the utilization of that nontaxable income derived. At that particular time I made figures and calculations predicated on the depreciation that was allowable, and that proved conclusively that by the utilization of that [59] method, they would ultimately own the property free and clear, paid with nontaxable income.

Q. Did you advise them to hold it? A. I did.

Q. When was that? A. In 1943. It was prior to the recording of those instruments. I don't remember the dates now.

Q. Did you have more than one conversation with Mr. Edgar Cohn and his father concerning the subject? A. I had many conversations with them.

Q. Did the time come in 1943 when they discussed with you that subject and stated they were

going to hold them? A. Ultimately, they came to the conclusion that that was the process to follow.

Q. Did they tell you that? A. They told me that.

Q. When? A. That is when the buildings were in the course of construction. I don't remember the date.

Q. You wouldn't remember the date or the year? A. No. No buildings were completed at that time." [T. 237-238.]

On cross-examination, he testified:

"Q. Now, regarding this conversation you had, to whom did you talk? A. I talked to Dan, Edgar and Max. Dan subsequently went into the Service, but subsequent to his going into the Service, I constantly talked to Max and Edgar as they were on the tract and I would drop over there a couple of times a week.

Q. In your conversation with them regarding whether they should hold this for investment or for sale, was the [62] matter of tax saving mentioned? A. In connection with the whole transaction was the utilization of depreciation for the purpose of building up an estate. Tax saving entered into the picture.

Q. I don't think you understood the question. Was tax saving mentioned at the time of the conversation as one of the reasons for your suggesting that they hold them as investment property? A. Yes.

Q. Do you remember what your conversation was to them about what the tax saving might be? A. The calculation I made gave evidence of the fact that by following the procedure which I had outlined, that by that process they would liquidate their entire

obligation with tax-free money and build up an estate by virtue of so utilizing that procedure.

Q. You say by liquidating their assets. Do you mean they could later sell them? A. They could hold them forever, but they could do the amortization through the medium of depreciation and apply it against the obligation and ultimately pay off the entire transaction and build for them an estate.

Q. Was there some mention that they be held over as a long-term capital gain? A. The whole idea was to build an estate [63].

Q. *Was there any conversation at all that they might later want to sell them? A. No.*

Q. Isn't it true that these multiple houses were originally built to sell? A. Not to my knowledge. They were built to rent or sell. They had to rent them at that particular time. *Due to the fact that they had to rent them. I suggested that they continue to rent them."* [T. 240-242.]

Harold K. Wood, certified public accountant for the partnership Security Construction Company and partners was called as a witness and testified with reference to the determination of the partners to hold the property for investment purposes as follows:

"A. Edgar came in to see me that particular day to discuss the multiple apartment buildings which they had under construction. He stated to me that under the requirements of the National Housing Agency they were required to rent them for a limited period. He said they had been considering what the effect of that requirement would be and they had projected what the rental use might be expected to show if they held them, themselves.

He told me that he had discussed that, himself and his father, with Mr. John Biby, who, at that time, was their attorney. He said as the result of their projection and investigation they had decided that the buildings would make a good investment for them to hold. He told me that they [187] had decided not to sell the buildings, not to offer them for sale, but to hold them for investment.

Q. What did you say? A. I accepted the information and made notes on it and then asked them if they had considered what the effect on the over-all picture would be on income taxes. His statement to me was, 'No, we don't intend to sell them. We are going to keep them for investment.'

I said to him, 'If you don't intend to sell them, something may happen in the future which may cause you to sell them anyway.' And I explained the provisions of 117-J and explained that the capital gains provisions in Section 117-J did not apply to property held primarily for sale to customers in the ordinary course of business.

I advised that I wished a written letter from him stating that they had determined to hold the buildings for investment so that there would be no question about it in the future if sale occurred." [T. 349-350.]

The letter requested by Mr. Wood is Petitioners' Exhibit 19 and is heretofore set forth in full in this Statement of Facts.

Prior to August 25, 1943, the applicable Federal regulations prohibited the sale of a dwelling unit in a private war housing project to an occupant until the expiration of four months' continuous occupancy [Resp. Ex. P, N.H.A. Order No. 60-3, Sec. 3a, effective 2-5-43, T.

175-177]. Section 3b of the regulation further provided that such housing could be sold to persons other than occupants [T. 178]. N.H.A. Order No. 60-3B, Section 3a(i) effective August 25, 1943, amended the previous regulation by shortening the time of occupancy to two months to qualify an occupant to purchase such housing [Resp. Ex. 2, T. 184-186]. When completed, the buildings were rented on written leases. A copy of the typical form of lease used was received in evidence as Petitioners' Exhibit 18 [T. 210]. The leases were for a term of one year, with automatic renewals for an additional year at the expiration of each year. In that connection, the lease provided as follows:

> "To have and to hold: The above described premises, with appurtenances, unto said party of the second part, from the 1st day of May, 1944, to the 30th day of April, A. D., 1945, at 12:00 o'clock noon, provided sixty days' written notice is given Lessor by Lessee of Lessee's intention to terminate this lease on said last mentioned date, otherwise this lease shall continue from year to year until terminated by like notice in some ensuing year. Lessor is entitled to terminate this lease upon like notice to Lessee at like dates." [T. 210.]

On cross-examination, Edgar M. Cohn testified with reference to the reason for entering into leases as follows:

> "Q. As I understand it, you entered into one-year written leases, is that right? A. Yes.
>
> Q. On the 69 apartment houses? A. Yes.
>
> Q. Why did you enter into one-year written leases? A. *Because we were holding the properties for investment and would hold them indefinitely.*" [T. 254.]

Until the end of 1944, when a tenant moved, the new tenant signed a similar type of lease for a one year term [T. 307]. There was introduced into evidence as Petitioners' Exhibit 16 [T. 104] a schedule of the apartments upon which one-year leases were cancelled and the apartments rerented. The schedule shows the days of rent lost and gained during the entire period that the partnership owned the 69 buildings. A computation of these figures shows that in the rental of the 210 rental units in the 69 buildings, there were only 103 net rental days lost. This corroborates Edgar Cohn's testimony that the buildings had an average occupancy of 99½% at all times [T. 317].

Edgar M. Cohn testified that he had one secretary helping him with reference to operating the rental business and one secretary with reference to conducting the building business [T. 309]. The one girl took care of nothing but rentals [T. 318].

During the time that the buildings were being constructed, the Petitioners had many opportunities to sell them [T. 221]. Edgar M. Cohn testified that the opportunities were "almost daily" [T. 223]. After the buildings had been constructed and occupied for a period of two months, which was the minimum period of time that they had to be rented before being sold to tenants, the Petitioners had frequent opportunities to sell the buildings and refused to do so [T. 223].

In the latter part of December, 1944, the Petitioners received information that World War II was nearing an

end and that Lockheed Aircraft would discharge all but about ten per cent of their employees, causing the apartment buildings to become 50% vacant [T. 224]. At that time it was estimated that Lockheed had approximately 100,000 employees, which would mean, from the information the Petitioners then had at hand, that Lockheed would discharge approximately 90,000 employees [T. 224]. Over three-fourths of the tenants in the 69 buildings were Lockheed employees [T. 225]. The buildings were situated about three-fourths of a mile from the Lockheed Aircraft plant [T. 225].

Edgar M. Cohn discussed the problem with the Petitioners' attorney, Mr. John Biby, and after giving consideration to the serious problem involved, determined to sell said buildings [T. 224].

At the time the Petitioners determined to hold the property for investment, they did not anticipate the said sudden change in the aviation program. It was their information, that civil aviation and peacetime industry would take up the slack. Edgar M. Cohn testified:

> "Q. (By Mr. Chehock): In January, 1944, is it not true, Edgar, that you knew that sooner or later the very thing that did happen in December, 1944, was going to happen, or at least you had reasonable grounds to believe it would? A. Not in the order in which it happened.
>
> Q. At least you knew those events were probably coming? A. Not immediately or even in the near future.

Q. Irrespective of when they might come, you knew they were coming in the future? A. I didn't know [80].

Q. I beg your pardon? A. I didn't know.

Q. Didn't you have reason to feel that when the cessation of hostilities would come about, that Lockheed would discharge most of its employees? A. No.

Q. Why did you know that in December if you wouldn't have known it earlier? A. *There was talk of a civil aviation program after the cessation of hostilities and the building up of a peace-time industry in the Burbank area. We based our reasoning on that logic."* [T. 256-257.]

After the Petitioners had determined to liquidate their investment in the said 69 rental buildings, they listed them for sale with real estate brokers in January, 1945 [T. 225]. The properties were listed for a net selling price, as shown in Respondent's Exhibit S [T. 201].

In the sale of the single-family residences which the Petitioners built for sale, the partnership, Security Construction Company, employed a real estate broker to devote his exclusive time to the sale of said houses [T. 226; Pet. Ex. 20; T. 227]. The apartment buildings which were sold by the independent brokers were not advertised by the partnership [T. 229]. The Security Construction Company paid for the advertising with reference to sales of the single-family homes which were built for sale [T. 229]. The Petitioners had no single-

family houses for sale in 1945 [T. 274]. The income tax return of Security Construction Company [Resp. Ex. C] shows that the partnership spent $902.75 for advertising in 1944 [T. 352]. In 1945, the year in which the apartment buildings were sold, Security Construction Company spent $34.66 in advertising [T. 352]. The Petitioners did not supervise the activities of the brokers who sold the apartment buildings and did not assist the brokers in selling said buildings [T. 280]. None of the apartment buildings was sold to a tenant [T. 305].

During the years in question, and up to the time of the trial, the Petitioners Daniel E. Cohn and Edgar M. Cohn were engaged in the dual business of building properties for investment and building properties for sale. [T. 328-346].

The Petitioners Daniel E. Cohn and Edgar M. Cohn organized a corporation known as "Orange Gardens" in April, 1947 [T. 328], and were its sole shareholders [T. 321-322]. Orange Gardens constructed 11 multiple-type buildings in North Long Beach, California, which were completed in March and April, 1948 [T. 328]. They were immediately put on the market for rental and have been rented ever since [T. 328]. The Court found that the buildings are still held for rental [T. 32].

SPECIFICATION OF ERROR.

Petitioners' Specifications of Error Are Set Forth Preceding the Several Subdivisions of the Argument Which Follow.

ARGUMENT.

I.

The Tax Court's Decisions Are Founded Upon the Mistaken Concept and Interpretation of Section 117(j) of the Internal Revenue Code. The Interpretation of the Tax Court Does Violence to the Intent and Purpose of Congress in Enacting That Section in That It Treats a Decision of a Taxpayer to Sell His Property, Held for Investment, as Constituting a Change of Purpose From Holding for Rental and Investment to Holding for Sale.

Section 117(j) of the Internal Revenue Code, so far as material here, provides:

> "(1) *Definition of Property Used in the Trade or Business.*—For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1) held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. * * *"

In *Allbright v. United States* (C. C. 8), 173 F. 2d 339, 344, the Court, in referring to Section 117(j) of the Internal Revenue Code and its broad application, said:

> "Nothing in the language of the Act indicates an intention on the part of Congress to deny the relief granted by the section to any taxpayer whose transactions meet the prescribed conditions."

The evidence in the record and which has been set forth in the statement of facts demonstrates that Petitioners Daniel and Edgar Cohn were, during the time in question, engaged in the business of building residential properties for sale immediately upon completion, *and in building residential multiple dwellings for rental and investment purposes* [T. 214 and 217].

In one of its latest decisions the Tax Court has recognized the proposition that a dealer in real estate may sell a defense housing project and receive capital gains treatment. In this connection the Tax Court in *Walter R. Crabtree, et al. v. Commissioner* (July 22, 1953, 20 T. C. 841), said:

> "In the instant case, to reach the conclusion for which Respondent contends would be tantamount to saying that a dealer in real estate could never sell *a defense housing project* and be accorded capital-gains treatment to such profits as may arise therefrom. *To so hold would be a clear usurpation of the legislative prerogative, for nowhere does Respondent point to, nor can we find, any evidence of Congressional intent to treat dealers in real estate who sell investment property differently from dealers of any other sort.*" (Italics ours.)

The *Crabtree* case involved a situation where the taxpayers had sold 33 housing units of a defense housing

project early in 1946, and in 1948 they sold the 3 remaining houses of the defense housing project. All of these were reported on a capital gains basis. The Commissioner determined that the gains were subject to treatment as ordinary income, and the Tax Court held that this determination was erroneous.

The evidence in these cases referred to and quoted in the Statement of Facts establishes without contradiction that the properties involved were held for investment for more than one year and were investment properties within the meaning of Section 117(j). The fact that a time came when it was determined by Petitioners, upon sound business reasoning, that the holding of said properties for rental by Petitioners would be hazardous and their original intention of permanently holding them was thereby thwarted does not deprive Petitioners of the benefits of capital gains treatment. In *Alamo Broadcasting Company,* 15 T. C. 434, 451, the Tax Court said:

> "We have previously held that 'used in the trade or business' means 'DEVOTED TO THE TRADE OR BUSINESS' and includes property purchased with a view to its future use in the business, EVEN THOUGH THIS PURPOSE IS LATER THWARTED BY CIRCUMSTANCES BEYOND THE TAXPAYER'S CONTROL. *Carter-Colton Cigar Co.,* 9 T. C. 219. See also *Wilson Line, Inc.,* 8 T. C. 394; *Kittredge v. Commissioner,* 88 Fed. (2d) 632; *Yellow Cab Co. of Pittsburgh v. Driscoll,* 24 F. Supp. 993; *Independent Brick Co.,* 11 B. T. A. 862."

It would be difficult to perceive evidence more convincing than that contained in this record of unexpected happenings which *thwarted* an investor's original purpose. The evidence shows that over three-fourths of the occupants

of the apartments were employed by Lockheed Aircraft [T. 225]. In late 1944 the Petitioner, Edgar Cohn, received information that there would soon be cancellations of war contracts and upon the ceasing of hostilities Lockheed would lay off all but about 10% of its employees. We quote Mr. Cohn's testimony as follows:

> "Q. And what was your reason or the reason that you had for changing, for determining to sell the buildings? A. There were rumors that the cessation of hostilities would be in the near future and that Lockheed Aircraft would discharge all but about 10 per cent of their employees and our apartment buildings, *in our estimation, would have a 50 per cent vacancy factor.*
>
> After consultation with Mr. Biby, we decided to sell our assets.
>
> Q. You mean these particular assets? A. These particular assets.
>
> Q. Do you know how many employees Lockheed had? A. I did not know at that time. My estimate was 100,000."

At the time the buildings were built and the determination was made to hold them for investment purposes, the information was that at the end of hostilities there would be a large civil aeronautical development which would maintain the aviation industry [T. 257].

The decision to liquidate the investment was motivated by good business judgment based upon the facts as they then appeared. It was this decision on the part of the Petitioners that the Tax Court construed to be a change of purpose. In this connection the Court said:

> "Our conclusion, based upon the findings and ultimate findings is that the 69 multiple houses were

> held primarily for sale to customers in the ordinary course of the partnership's business of building and selling houses during 1944 *and 1945, and at least during 1945, when they were sold,* and that they were not at any time 'investment' property—capital assets of a business of renting property for investment." [T. 37.] (Italics ours.)

The italicized portions of the above quotation would indicate that even though the Tax Court might concede that the property was held for investment, and not for sale, during 1944, it really made no difference for what purpose the property was held in 1944 in view of the fact that Petitioners had determined to sell and did sell the property in 1945.

This holding by the Tax Court is contrary to the holding in *McGah v. Commissioner,* 193 F. 2d 662, wherein the Court said:

> "The Tax Court found that, at the time of their sale, the 14 houses were held by petitioners primarily for sale to customers in the ordinary course of petitioners' trade or business. There was, however, no finding as to whether the 14 houses were so held prior to their sale, or as to when and how long, if at all, the 14 houses were so held prior to their sale. Such findings should be made."

There is no evidence to support the determination of the Tax Court that the Petitioners were holding the 69 multiple buildings for sale in the ordinary course of their business of building and selling properties, and without such evidence, the Court of Appeals will draw its own inferences from the undisputed facts. In *McGah v. Com-*

missioner of Internal Revenue, 210 F. 2d 769, the Court said:

> "Petitioner urges that there is no substantial evidence to support such a finding. While giving careful consideration to the finding of the Tax Court, *we draw our own inferences from undisputed facts.*"

In *Victory Housing No. 2, Inc. v. Commissioner,* 18 T. C. 466, the Tax Court determined that the property involved was the type that was subject to depreciation, but that nevertheless in the year in which the property was sold the purpose of holding for investment was changed to holding for sale. Judge Murdock, of the Tax Court, in dissenting, said:

> "A decision of the owner to sell must necessarily precede every sale *and after he makes that decision he is holding the property for sale until he succeeds in selling it.*" (Italics ours.)

When the case reached the Court of Appeals, *Victory Housing No. 2, Inc. v. Commissioner,* 205 F. 2d 371, the Tax Court was reversed, and the reasoning of Judge Murdock as set forth in his dissent is supported by the Court of Appeals as follows:

> "The fact that 42 units were sold over a period of six months does not establish a real estate business or the sale of property in the ordinary course of such a business. If a farmer has twenty separate farms which he uses in his farming business and, desiring to quit farming and to dispose of his holdings, sells them in the course of three or four weeks, or three or four months, the fact that there are a considerable number of sales in a relatively short time standing alone is not sufficient to put him in the business of

selling farms in the ordinary course of such a business. The same must be said with respect to these 42 units."

The following also supports the above interpretation of Section 117(j). *The Tax Fortnighter,* Vol. 1, p. 118:

"If a decision to sell is to be the controlling fact in determining whether or not Sec. 117(j) is to apply, the whole section might just as well be ignored."

II.

The Uncontradicted Evidence and Facts, Together With the Inferences to Be Drawn Therefrom, Establish That the Subject Property Was Held by Petitioners for Investment and the Tax Court Erred in Not so Holding.

1. The priorities granted to Petitioners by the Government required them to rent the subject properties, although they could have at any time sold them to other investors. No sales could be made to the occupants within certain specified times. In support of the proposition that this is a circumstance to be considered by the Court in determining whether the properties were held for rental and not for sale, the Tax Court, in *Julia K. Robertson, et al. v. Commissioner,* 8 T. C. M. 870, said:

"Sales could only be made under authorization of the National Housing Agency to occupants after four months continuous occupancy and at prices prescribed, etc.

"*Unless without evidence we are to impeach the good faith of petitioner's contract with these government agencies, the housing units in question were*

> *acquired by petitioner for rental purposes and not primarily for sale* to customers in the ordinary course of a trade or business. Furthermore, petitioner's testimony that such was his purpose in acquiring the properties is corroborated by the use to which the properties were devoted in the taxable years. In those years they were devoted primarily to rental, not to sales." (Italics ours.)

2. Mr. Hollingsworth, vice-president of Glendale Federal Savings and Loan Association, advised Petitioner to hold the property for investment purposes for the reason that the properties would pay for themselves with tax-free depreciation money [T. 237, 238]. His reasoning and advice are supported by the partnership income tax returns, and the Supplementary Stipulation of Facts [T. 55a to 55f]. This advice by Mr. Hollingsworth was concurred in by Mr. John E. Biby, attorney for Petitioners [T. 218].

3. Upon the determination to hold the properties for investment, a proper recording of that fact was given in writing by Petitioners to their accountant, Harold K. Wood [T. 219-220; Pet. Ex. 19].

4. Petitioners entered into one-year written leases on all of the rental properties when renting, which leases provided for an automatic renewal from year to year unless terminated by either the landlord or tenant [T. 210-211]. In *Louis Rubino, et al. v. Commissioner,* 8 T. C. M. 1095, the Tax Court held:

> "It would seem that under these conditions if petitioner had been in the business of renting homes, he

> would have leased them for long periods of time. Certainly this fact is *strong evidence* that he wished to keep his property easily available for sale, or, in other words, that he was holding it primarily to sell."

If evidence of a month-to-month renting is *"strong evidence"* that the taxpayers in that case were holding the property for sale, it would seem that a lease such as Petitioners entered into would be *"strong evidence"* that they wished to keep their property for investment.

6. The partnership segregated its rental business from its business of selling single family houses. Edgar Cohn testified he had one secretary helping him with reference to operating the rental business and he had one secretary with reference to conducting the building business [T. 309].

7. At the time the buildings were under construction and nearing completion, and after they were completed, the Petitioners had frequent opportunities to sell the buildings and refused to sell them [T. 222-223].

8. The real estate brokers selling the single family residences of Petitioners worked under the direct supervision of Petitioners [T. 226], while the brokers who sold the apartment buildings which were held for investment worked independently of Petitioners, and all that Petitioners did was to sign the necessary documents [T. 280].

9. The apartment buildings were held for rental from 9 to 20 months, or an average period of between 12 and 14 months [T. 29].

10. None of the apartment buildings was sold to a tenant [T. 305].

11. The investment was a good one in that the net rental income from the apartment buildings for the period held for investment purposes, before depreciation, was $63,305.46, and after depreciation was $37,219.16 [T. 55a to 55f].

12. Shortly after the sale of the said 69 apartment buildings the Petitioners reinvested in Orange Gardens, a large housing project, and they continue to hold that investment [T. 32 and 328].

The foregoing facts are uncontradicted and one or more of such facts have usually supported favorable treatment of a taxpayer in "117(j)" cases. It would seem from the authorities cited and particularly *McGah v. Commissioner,* 193 F. 2d 662 and 210 F. 2d 769; Victory *Housing v. Commissioner* 205 F. 2d 371; *Robert Dillion v. Commissioner,* ..... F. 2d ..... (not yet reported). That the existence of all of these facts in combination should lead to only one logical conclusion, namely, that the petitioners were entitled to be taxed on the sale of said investment properties on a capital gains basis.

III.

The Frequency and Continuity of Sales by Petitioners in Liquidating Their Rental Housing Is Not Controlling, and There Is Nothing in Section 117(j) Which States or Implies That the Section Should Apply Only to Those Who Have Few and Infrequent Transactions.

The Tax Court held:

> "There were, in 1945, the frequency, continuity, and substantiality of sales usually indicative of holding property primarily for sale." [T. 41.]

The following are cases of the Tax Court and Court of Appeals wherein sales were frequent and continuous of residential property including war housing property which had been held for rental by the taxpayers and in which the taxpayers received the benefit of capital gains treatment:

Elgin Building Corporation, 8 T. C. M. 114, 26 rental units sold in 1944 and 47 rental units sold in 1945;

Nelson A. Farry v. Commissioner, 13 T. C. 8, 9, 19 properties sold in 1944 and 27 in 1945;

McGah v. Commissioner, 193 F. 2d 662, in a 3 months' period in 1944 the taxpayers in that case sold 14 houses. It was found and determined in that case that the taxpayers were at all pertinent times engaged in the business of building houses for sale and building them for rent. During 1943 and 1944 the taxpayers built 84 single houses and 32 four-family apartment houses, or a total of 212 dwelling units, all of which were rented on a month-to-month tenancy upon completion. From April 10 to June 30,

1946, 42 single-family houses were sold, and from July 6, 1946, to October 1, 1946, 42 single-family houses were sold;

Lewis and Lamberth v. Commissioner, 11 T. C. M. 80 (consolidated cases), taxpayers Lewis sold 28 war housing duplexes in 1945. Lamberth sold 20½ war housing duplex houses in the same year. The 77 dwelling units sold in the one year were accorded capital gains treatment by the Tax Court;

Delsing v. United States, 186 F. 2d 59, in the 3 months of August, October, and December, 1945, the taxpayer sold approximately 12 war housing rental units;

Roy L. Self, et al. v. Commissioner, 9 T. C. M. 421, taxpayer sold 13 single family war houses in a 5 months period;

Walter R. Crabtree v. Commissioner, 20 T. C. 120, taxpayers sold 16 war housing units in 1944, 33 in early 1946, and the remaining 3 in 1948. According to the Tax Court: "Substantially all of the units were sold within a short period of time . . .";

Victory Housing No. 2 v. Commissioner, 205 F. 2d 371, 42 war housing units sold in period of 6 months.

The following are some of the cases involving sales of personal property which were afforded capital gains treatment:

A. Benetti Co., 13 T. C. 1072, 93 units of personal property sold in 1943, 135 sold in 1944, and 27 in 1945;

Mary Alice Browning, 9 T. C. M. 1061, 24 pieces of rental equipment sold in 1944 and 32 pieces of rental equipment sold in 1945.

The Petitioners' reasons for liquidating their investment were good ones. They of course could have faced the possibility of losing half of their tenants through the discharge of employees by Lockheed Aircraft, and had this occurred their operations, which up to that time had been very profitable, would have become a catastrophic loss operation. To hold that an investor must take the risk of operating at a ruinous loss or be deprived of the benefits of Section 117(j) would appear to us to be an illogical and improper interpretation of that section. American investors have spent substantial sums of money in subscribing to various investment advisory publications and paying fees to investment counsellors. With changing conditions, what is today a sound investment may next year be anything but a good investment. The usual procedure of the investor is to liquidate or change his investments when he believes that he will suffer a depreciation or loss by holding such property. The latest case by the Court of Appeals, which we believe is directly in point and supports the proposition that the liquidation by the Petitioners of their investment did not subject the profits from such liquidation to tax on an ordinary basis is *Robert W. Dillon v. Commissioner,* ..... F. 2d ..... (C. C. A. 8, June 4, 1954) (not yet reported). In that case the taxpayer built 20 defense houses in 1944 and 1945, and after the restrictions on the sale and rental of defense housing were removed in October, 1945, the taxpayer determined to sell the 20 houses *"because he thought it was no longer economically sound to keep them."* The houses were sold in 1946, and the Tax Court determined that they were held primarily for sale to customers in the ordinary course of his business and the gains were taxable as ordinary income. In commenting on and reversing this holding, the Court of Appeals said:

"The Court arrives at its conclusion on this point by a consideration of the business done in the taxable year 1946, *and attaches no significance to the resolution of the taxpayer to liquidate his holdings in the houses in the fall of 1945.* The Court cites one of its own opinions only to support its theory. Strictly applying this rule had the taxpayer decided to liquidate his holdings in December, 1945, and failed to complete the liquidation before January, 1946, the result would have been the same. Neither a statute nor the decision of any court is cited to support the theory of the Tax Court. *We think the principle applied is neither legal nor reasonable, but that it is clearly erroneous.* Under the evidence here the petitioner was not in the real estate business in Omaha in 1946. He was liquidating his ownership of 20 houses through a corporation engaged in the real estate business. *There is no conflict in the evidence on this decisive point.*" (Italics ours.)

If the determination of the Tax Court is to be followed it would require that Section 117(j) be construed to mean that if the owner of a large number of investment properties determines to liquidate for good and impelling reasons he would be deprived of the benefits of that Section while the owner of only one or a very few properties would receive its benefits. There is nothing in the Section which expresses or implies that the number of sales has anything to do with its application. We believe that the construction of the Section placed thereon in the cases of *McGah v. Commissioner,* 193 F. 2d 662; *McGah v. Commissioner,* 210 F. 2d 769; *Victory Housing v. Commissioner,* 205 F. 2d 371; and *Robert Dillon v. Commissioner,* ..... F. 2d ..... (C. C. A. 8, June 4, 1954, not yet reported), is a proper one.

IV.

The Ratio of Income From Sales and Income From Investment Property Is Not Controlling in Determining Whether Petitioners Were Entitled to Capital Gains on the 69 Apartment Buildings.

The Tax Court, in its opinion, said:

> "It is observed, also, that the total net profit realized upon the sales of the 69 houses in 1945, based on sales prices was $238,329, more than 6 times the net rentals received in 1944, $28,793." [T. 41.]

It was stipulated that the net income from the subject properties during the time same were rented was $63,-305.46 before depreciation, and after depreciation the net income was $37,219.16 [Supplementary Stipulation of Facts, T. 55a to 55f].

It was further stipulated by the parties, and the Court found that the 69 apartment buildings were completed on the following dates:

"Tract 13170	Completion Date
16 multiples completed by	2/14/44
17 multiples completed by	3/ 8/44
10 multiples completed by	3/28/44
13 multiples completed by	4/25/44
56	
Tract 13171	
13 multiples completed by	6/14/44."

[T. 26 and 54.]

The Tax Court further found:

> "The 69 multiple unit houses were rented, prior to the sales, for a period of 12 to 14 months, on an average. The shortest period any house was rented before a sale, was about 9 months; and the longest period any house was rented was about 20 months." [T. 29.]

An analysis of the foregoing would establish that the properties were rented on an average of approximately 9 months during the year 1944, and for income purposes one month could be added by reason of the fact that the last month's rent was paid in advance. The point that we want to make is that the substantial net income supports the proposition that the investment of Petitioners was a good one, and further supports the validity of the advice received by Petitioners at the time they determined to hold the buildings for investment purposes. Taking the Tax Court's own formula that the rental income in the part of 1944 that the buildings were rented was six times less than the profits realized from the sale of the buildings, we come up with the result that the Petitioners had a net income from rentals of approximately 20% if the rental period were extended the full 12 months of that year. We do not believe that the ratio of income from rentals and income from sales should be considered as controlling, unless possibly the properties held for income tax purposes are unprofitable. The Court, in *Delsing v. United States,* 186 F. 2d 59, held:

> "The disparity between income from sales and from rentals is not controlling."

The *Delsing* case involved the question of whether profits from the sale of 12½ duplex dwelling units should be treated as capital gains or ordinary income. The taxpayer for several years prior to World War II had been engaged in a substantial business of construction of homes for sale. As a result of solicitation by the Federal Housing Administration to provide defense rental housing, taxpayer constructed 45 defense rental units, and he was required to rent them at fixed monthly rentals to persons engaged in war activities. The housing was rented until August, 1945, when he commenced selling them. The taxpayer was associated in the business of building and selling houses from 1942 to 1945, and during that time built 273 defense housing units.

In reversing the lower court, the Court of Appeals held:

> "We think the transactions evidenced the sale of capital assets and that, accordingly the judgment must be, and is, reversed and the cause remanded with direction to enter judgment in favor of the taxpayer for the amount of refund claimed."

V.

The Tax Court Erred in Failing to Find and Hold That Petitioners Were Engaged in the Dual Activity of Building Housing Units for Investment, as Well as Building Houses for Sale. The Fact That Petitioners Were Engaged in Such Dual Activity of Building Housing Units for Rent and Houses for Sale Does Not Deprive Them of the Capital Gains Treatment on the Profits From the Sale of the Properties in Question. Furthermore, the Evidence Conclusively Established That They Had for Many Years Held Substantial Residence Properties for Investment and Income Purposes.

The Tax Court at some length in its Findings recited the various activities of the Petitioners, Daniel and Edgar Cohn, with reference to their real estate operations [T. 32.] Petitioners have at all times conceded that Daniel and Edgar Cohn were engaged in the dual business of building houses for sale and building apartments for rental. Edgar Cohn testified:

> "I am in the real estate business, with the construction of buildings for sale *and for investment.*" [T. 14.]

Petitioners Daniel and Edgar Cohn were at all times the sole shareholders of a California corporation known as "Orange Gardens" [T. 321-322]. In 1947 the corporation constructed 11 two-story apartment buildings in North Long Beach, California [T. 32]. There were 91 apartments in the 11 buildings [T. 322]. We specifically point out the number of units in this rental project for the reason that the Tax Court's Findings with reference

to this project could be misleading. We quote from said Findings:

> "Orange Gardens was organized in 1947. In 1947 it built *11 apartments* in North Long Beach, about 7 miles from the ocean. The apartments were rented immediately and are still rented." [T. 32.]

It should be conceded that a project containing 91 apartments is a substantial one, and the fact, as found by the Court, that the buildings are still held for rental is graphic corroboration of the fact that Petitioners were and are engaged in the dual business of holding property for investment as well as building for sale.

The Tax Court and this court have held that a taxpayer may be engaged in the business of building houses for sale and building houses for investment, and that such dual activity does not deprive the taxpayer of the benefits of Section 117(j). The following cases, many of which supported our argument with reference to frequency and continuity of sales, also support that proposition.

In *Nelson A. Farry v. Commissioner,* 13 T. C. 8, 9, the Court found that the petitioner was engaged in the business of "collecting rentals for a commission, insurance, investments, *and dealing in real estate.*" Although there were 46 sales of properties by the petitioner in that case, he was accorded capital gains treatment.

In *McGah v. Commissioner,* 193 F. 2d 662, the taxpayers were determined by this court to have been engaged in the trade or business "of renting and *selling* houses in San Leandro, California."

In *Delsing v. United States,* 186 F. 2d 59, the taxpayer had been for many years prior to 1945, the year in ques-

tion, and was still engaged in the business of building houses for sale. The taxpayer built war rental housing units and in 1945 sold them. The lower court held that the profit from the sales was subject to treatment as ordinary gains. The Court of Appeals reversed the lower court. In the *Delsing* case it was established that the taxpayer had written to the Federal Housing Administration in 1942 at the time the application for the loans was made that "these houses are to be built for sale or rent . . ." In commenting upon the said quoted statement, the Court held:

> "We think the weight to be given to the statement in the letter has been overemphasized in view of the subsequent restriction embodied in the formal application and agreement under which the houses were actually built, held, and operated by the taxpayer during the period of approximately three years."

In *Julia K. Robertson, et al. v. Commissioner,* 8 T. C. M. 870, the taxpayers had been engaged for several years prior to the years in question in the business of building residence property for sale. In the months of April and December, 1944, they sold 16 war housing dwelling units. In June, 1945, they sold 4 multiple dwelling units, and from September to December, 1945, they sold 9 single houses. The Tax Court held that the taxpayers were entitled to capital gains treatment on the profit from the sale of said war housing.

In *Roy L. Self, et al. v. Commissioner,* 9 T. C. M. 421, the facts established that in 1944 and prior thereto taxpayer was engaged in the business of building and selling houses. From 1941 to 1944 he built the 13 houses which are involved and rented them. The houses were

sold during a 5-months' period from April to August, 1944, because he was then pressed for money. The profits from the sales were afforded capital gains treatment.

In *James A. Baer v. Commissioner,* 11 T. C. M. 520, taxpayers were engaged in the business of building houses for sale and of building houses for investment. They sold a number of houses which had been held for investment in the 4 years from 1943 to 1946. They were financed by long-term mortgages. Their reasons for selling were varied. Some they sold in order to construct houses in a better neighborhood. Some were sold because they were poorly planned and in order to enable them to build better planned houses. The Court stated that it made no difference whether the builder was not allowed to sell because of some government restrictions, and had to rent, or whether he merely chose to rent, so long as his primary purpose was not to sell in the ordinary course of his construction business. In concluding, the Court determined that the taxpayers were entitled to be taxed on a capital gain basis.

In *Walter R. Crabtree v. Commissioner,* 20 T. C. 120, Taxpayer Walter R. Crabtree had been a real estate broker since 1925. He had started in the subdivision business in 1927 and had engaged for many years in the building and selling of houses. He was engaged in the dual operation of building for sale and building for rental. In 1943 and 1944 he constructed war rental multiple units. In 1943, Petitioner, through another wholly owned Florida corporation, completed a group of apartment units, which he still owns and rents profitably (Orange Gardens). Taxpayer sold 16 of the war housing units in 1945; 33 in early 1946, and the remaining 3 in 1948. Rentals on the war housing units were on a month to month basis.

The Court found that "substantially all of the units were sold within a short period of time. . . ." The gains from the sale of said war housing units were determined to be capital gains.

In *Victory Housing No. 2 v. Commissioner,* 205 F. 2d 371, taxpayer sold 42 war housing units during a six months' period in 1946. The Tax Court determined that the gains were subject to being taxed as ordinary income and the Court of Appeals reversed that decision. The principals had been engaged from 1943 to 1945 in the business of building and selling houses.

If it were the law that a dealer in real estate could not at the same time be an investor in real estate, it would deprive the taxpayer engaged in the business of dealing in real estate of the opportunity of investing in the business about which he had the greatest knowledge. The foregoing cases appear to us to be conclusive in favor of the proposition that the dual activity of petitioners does not foreclose them from the benefits of Section 117(j) of the Internal Revenue Code.

Conclusion.

By reason of the uncontradicted evidence, and the authorities herein cited and particularly the recent cases of *McGah v. Commissioner, supra, Victory Housing v. Commissioner, supra,* and *Robert Dillion v. Commissioner, supra,* we believe that the decisions of the Tax Court should be reversed.

Respectfully submitted,

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Attorney for Petitioners.

No. 14221

In the United States Court of Appeals for the Ninth Circuit

ALICE E. COHN, MARION A. COHN, DANIEL E. COHN AND EDGAR M. COHN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 17-45) are reported at 21 T.C. No. 11.

JURISDICTION

The petitions for review (R. 49-51, 374-375) [1] involve deficiencies in income taxes determined by the Commissioner against the taxpayers for the calendar years 1945

[1] Due to the factual similarity in these cases, it was stipulated that, except for the decisions (R. 45-48), the record should contain the proceedings, documents, etc., only in the case of Edgar M. Cohn. While statements in the brief will refer to all taxpayers, record references will cover only one case. (R. 374-375.)

and 1946. On September 27, 1949, the Commissioner mailed the taxpayers notices of deficiencies in taxes for those years. (R. 5, 8.) Within 90 days thereafter and on October 31, 1949, the taxpayers filed petitions with the Tax Court of the United States for a redetermination of the deficiencies in income taxes for the calendar years 1945 and 1946 (R. 3, 5-7), under Section 272 (a) (1) of the Internal Revenue Code. The decisions of the Tax Court that there were deficiencies in income taxes for the years 1945 and 1946 were entered on October 26, 1953 (R. 45-48), and the case is brought to this Court by petitions filed December 28, 1953. (R. 4, 49-51).

Jurisdiction is conferred on this Court by (R. 4, 49-51) of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether there is sufficient evidence in the record to support the Tax Court's finding that the 69 multiple unit houses in question were held during 1944 and 1945, primarily for sale to customers in the ordinary course of the partnership's business within the meaning of Section 117 (a) and (j) of the Internal Revenue Code and as a result were not capital assets, so that the gain realized in 1945 and 1946 on the installment basis, from their sale in 1945, constituted ordinary income rather than long-term capital gain.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and Regulations are set forth in the Appendix, *infra*.

STATEMENT

The facts as stipulated and as found by the Tax Court (R. 19-35) are as follows:

Edgar and Marion Cohn, and Daniel and Alice Cohn are, each, husband and wife. Edgar and Daniel are brothers. Daniel and Alice Cohn were married on June 5, 1945. All were residents of California during the taxable years, and each filed a separate income tax return for 1945 and 1946 in which income was reported on a community property basis. For convenience, Edgar and Daniel are referred to hereinafter as the taxpayers. (R. 19.)

The taxpayers are the sons of Max Cohn. Max Cohn and the taxpayers owned the stock in the corporation, Security Construction Company, Inc., which, in 1941, subdivided land in the area "Beautiful Glenwood," near Burbank, and built thereon 66 single family houses. The houses were held for sale to customers and they were sold in 1941 and 1942 upon completion. Tracts of land which are numbered 13170, 13171, and 13172 are involved in these proceedings and they are adjacent to and near the tract on which the corporation built 66 houses for sale in 1941. (R. 19.)

On May 21, 1942, Edgar and Daniel formed a partnership, Security Construction Company, referred to hereinafter as "the partnership," in which they were equal partners. The business of the partnership in its income tax returns for the years 1942 to 1946, inclusive, is stated to be "real estate"; and the business of the taxpayers in their individual returns for 1945 and 1946 is stated to be "real estate." (R. 20.)

The partnership acquired tract number 13172, as acreage, on May 25, 1942. It acquired tract number

13170, subdivided into 56 lots, on September 28, 1943. It acquired tract number 13171, subdivided into 132 lots, on January 21, 1944. The three tracts of land were acquired from Max Cohn. They are located about three-quarters of a mile from the Lockheed Aircraft Corporation plant. (R. 20.)

The partnership engaged in its business from May 21, 1942, until about April 1, 1946, after which date it was inactive. During the period of active business in the years 1942 to 1946, inclusive, the partnership built and sold 324 houses, of which 253 were single-unit houses and 71 were multiple-unit houses. Prior to their sale, 69 of the multiple-unit houses, which are involved in these proceedings, were rented. The net profit from sales and the net rents received by the partnership in the years 1942 to 1946 were as follows (R. 20, 21):

Year	Houses Sold	Single Units Sold	Multiple Units Sold	Net Profit, Sales	Net Rents
1942.....	21	21	–0–	$ 15,035	–0–
1943.....	109	109	–0–	73,349	–0–
1944.....	109	109	–0–	111,436	$28,793
1945.....	69	–0–	69	238,329	8,425
1946.....	16	14	2	64,835	745
Total.....	324	253	71	$502,984	$37,963

By August 26, 1942, tract 13172 was subdivided by the partnership into 132 lots. During 1942 and 1943, the partnership built 130 single family houses in that subdivision. All of the houses were sold immediately upon completion; 21 houses were sold in 1942 for a net profit of $15,035; and 109 houses were sold in 1943 for a net profit of $73,349. All of these houses were built for sale to customers in the ordinary course of the partnership's business. The partnership reported the gain from the sales as ordinary income, on the installment basis. The sales of the houses were made by a real es-

tate broker who devoted his full time to the work, with the help and cooperation of the partnership. The broker received a commission of $30 for each house hold. The partnership bought two buildings adjoining the tract in 1941 and 1942, for the transaction of business, which it kept until 1946. Edgar Cohn and various real estate brokers used these buildings in their work. (R. 21.)

During the war years Edgar Cohn made continuous inquiries of the local offices of the Federal Housing Administration (F.H.A.) about the availability of priorities for the construction of houses in the area where the partnership was building houses. He learned in the early part of the summer of 1943 that F.H.A. planned for the building of about 1,000 units of defense housing in the San Fernando Valley where tracts 13170 and 13171 are located, and he intended applying for permits to build more single family houses on tract 13170. However he was advised at that time that priorities would be granted for multiple-unit houses only. He, therefore, made application for authorization to build multiple-unit houses. (R. 21-22.)

Effective February 5, 1943, the National Housing Administration (N.H.A.) issued regulations relating to the construction of defense housing which controlled the occupancy and sale thereof. These regulations applied to private war housing begun on or after February 10, 1943, and they were in force, with some revisions and amendments until some time in October, 1945, when they were revoked. (R. 22.)

Under the N.H.A. regulations effective February 5, 1943, private war housing had to be held for rental only to eligible war workers for the duration of the national

emergency, and, except for involuntary transfers, could be disposed of only in the following manner (R. 22-23):

> An occupant, after 4 months' occupancy, could purchase a private war housing unit occupied by him. A person who would not himself occupy such housing could purchase such housing at any time, in accordance with N.H.A. regulations, provided that the N.H.A. limitations applicable to such housing, relating to occupancy and disposition, before such purchase should continue to be applicable after the purchase. Furthermore, at any time after 60 days after completion of any private war housing, the owner could petition N.H.A. to permit such housing to be disposed of in some way other than the pertinent regulations prescribed.

The partnership's application to F.H.A. to build multiple-unit houses in tract 13170 was granted on July 17, 1943, when it was authorized to build 23 four-unit, and 33 two-unit houses, i.e., 56 houses comprising 158 dwelling units, and by War Production Board (W.P.B.) priorities, materials were issued. Construction was not started until early in October, 1943. Before construction was started, amendments of the N.H.A. regulations applicable to private war housing became effective. Also, before construction of the 56 houses started, the partnership made application to F.H.A. for authorization to construct private war housing on tract 13171. (R. 23.)

N.H.A. General Order 60-3B (R. 184-194), effective as of August 25, 1943, amended N.H.A. General Order 60-3 (R. 175-183), by permitting an owner of war housing units to sell to war workers, within 15 days of completion and without first renting the units, one-third of

all war housing units placed under construction by the owner in any war housing area. It also permitted the sale of any war housing unit to a war worker occupant after the unit had been rented for two months. There was no change in the provisions of the prior order permitting an owner to sell war housing units, at any time, to a purchaser who would abide by the N.H.A. regulations relating to the occupancy and disposition of war housing units. (R. 23-24.)

Prior to September, 1943, Edgar Cohn was aware of the new N.H.A. Order 60-3B amending the earlier order. He intended applying for authorization to build houses on tract 13171, and knew that he could apply to N.H.A. to recognize the partnership's construction on the two tracts 13170 and 13171 as one project, and that by treating all the construction as one project he could sell one-third of the houses upon completion, provided they were sold within 15 days. Also, by September, 1943, N.H.A. was authorizing construction of single unit houses. (R. 24-25.)

In September, 1943, before construction of the 56 multiple-unit houses, the partnership filed application with F.H.A. to build 13 four-family houses comprising 52 units, and 109 single-unit houses, a total of 161 dwelling units. The applications were approved; priorities were issued on December 17, 1943. The partnership, then, was authorized to construct 178 houses comprising 319 units of which one-third, roughly 109, could be sold upon completion.[2] The remaining two-thirds, compris-

[2] The 69 multiple-unit houses comprised 210 dwelling units. The total housing authorized, comprised 319 dwelling units of which 109 were the single family houses. It appears that N.H.A. gave its approval of treating 109 units as one-third, and 210 units as two-thirds of the project built on tracts 13170 and 13171.

ing the 69 multiple-unit houses, 210 units, would have to be held for rental to eligible war workers, either by the partnership or its transferee. (R. 25-26.)

In October, 1943, the partnership began construction of the 56 multiple dwelling houses on tract 13170. In March, 1944, the partnership started construction on tract 13171 of the 13 multiple dwelling houses and the 109 single family houses. Construction of all the houses was completed in 1944, as follows (R. 26):

Tract 13170	Completion Date
16 multiples completed by	2/14/44
17 multiples completed by	3/ 8/44
10 multiples completed by	3/28/44
13 multiples completed by	4/25/44
56	
Tract 13171	
13 multiples completed by	6/14/44
109 singles completed by	9/ 1/44

The partnership sold all of the 109 single family houses to eligible war workers immediately upon completion. The sales were made during the months of July, August, and September, 1944. The partnership advertised the houses for sale. A real estate broker sold the houses, receiving a commission of $60 for each sale. Edgar Cohn assisted the broker in making the sales. The net profit realized from the sales amounted to $111,436. The profit was reported by the partnership in its return for 1944 as ordinary income, on the installment basis. (R. 27.)

The 56 multiple dwelling units on tract 13170 were gradually completed in the Spring of 1944, before all of

the single family houses were finished. The 13 multiple-unit houses on tract 13171 were completed by June 14, 1944, which, also, was before the 109 single-unit houses were completed, and before the first sales of the single-unit houses were made, which sales began in July, 1944. The partnership rented the 210 units in the 69 multiple-unit houses, as they were completed. The units were rented under one year written leases which contained a renewal clause. Under regulations of the Office of Price Administration (O.P.A.), in existence in 1944, the first and the last month's rent could be collected from a tenant only if a one year lease was given. In 1944, the partnership received gross rentals of $92,437.20 but the net rental amounted to $28,793 after payment of various expenses and finance charges. In the partnership return for 1944, depreciation on the multiple-unit houses was taken at the rate of four percent per annum. (R. 27.)

Edgar Cohn managed all of the activities of the partnership. Daniel Cohn was in the military service during 1944 and 1945 until his discharge on October 29, 1945. (R. 28.)

In the latter part of December, 1944, Edgar Cohn discussed with his advisors, the matter of selling the 69 multiple-unit houses. A decision was made to proceed actively to sell them, and in the early part of January, 1945, the partnership listed the multiple-unit houses with two separate real estate brokers, Leon Hahn, and Huff & Clair, who were to sell them on a commission basis of $300 for a four-unit house, and $150 for a two-unit house. The first sale was made on January 10, 1945. These two firms sold eight of 69 houses during January and early February of 1945. Edgar Cohn con-

sidered that the sales were proceeding too slowly, and on February 13, 1945, the partnership made an exclusive, 90-day agreement to sell the remaining 61 houses with another real estate broker named Field. The agreement was renewable for 90 days if one-half of the houses were sold within the first 90 days. Ray McKee, working for Field, devoted most of his time to selling the houses and by October 31, 1945, the 61 multiple houses were sold. Under the exclusive sales agreement with Field, the partnership was to receive a net amount for each house sold and Field was to receive the regular commission of five percent of the sales price, or anything above the stipulated net amount required by the partnership. The purchaser was to make a down payment. The difference between the down payment and the F.H.A. mortgage on each house sold was to be carried under a contract with the partnership, providing for monthly payments to the partnership until the amount due under the contract was paid in full. When that point was reached, the F.H.A. would substitute the buyer as the mortgagor, and the buyer would receive the deed held until then in escrow. (R. 28-29.)

The 69 multiple-unit houses were sold during a period of ten months, as follows (R. 29):

Month	Units Sold	Month	Units Sold
January	4	June	6
February	5	July	2
March	11	August	7
April	12	September	4
May	11	October	7
		Total	69

The four-unit houses were sold at prices ranging from $14,350 to $16,900. The two-unit houses were sold at

prices ranging from $8,100 to $8,950. The purchasers of all of the 69 houses took them subject to the N.H.A. regulations as to occupancy and disposition which were still in effect. Existing leases were assigned to the purchasers. (R. 29.)

The 69 multiple-unit houses were rented, prior to the sales, for a period of 12 to 14 months, on an average. The shortest period any house was rented, before sale, was about nine months; and the longest period any house was rented was about 20 months. During 1945, when vacancies occurred in the multiple-unit buildings, the partnership rented the units on an oral month-to-month basis. No written leases with new tenants were made in 1945. When the multiple-unit houses were sold, however, some of the original tenants were still occupants. Usually, re-rentals were made without a period of vacancy intervening between tenants. The partnership did not have any difficulty renting units that became vacant during 1945 while the houses were up for sale. During 1945, the partnership received gross rental of $45,841, and net rental income of $8,425. (R. 29-30.)

The partnership realized a net profit of $238,329 from the sales in 1945 of the 69 multiple-unit houses. The profit was reported by the partnership in its returns for 1945 and 1946 on the installment basis as long term capital gains. (R. 30.)

In 1945, Edgar Colm spent about 65 percent of his time looking for new locations to build, and about 35 percent of his time in his office. (R. 30.)

Early in the summer of 1945, the partnership applied for and received authorization from F.H.A. and priorities from W.P.B. to construct 14 single-family houses, and two-unit houses in Pasadena. Construction

started in August, 1945, and was completed during the first three months of 1946. The N.H.A. restrictions on occupancy and disposition of war housing units were removed in October, 1945. All of the houses were sold upon completion. The sales were made by real estate brokers on a commission basis. The partnership realized a net profit of $64,835 from the sales, which was reported as ordinary income on an installment basis. (R. 30.)

In 1946, the partnership received income of $745 from the rental of some small building or buildings other than the buildings located in the Pasadena project. Also, in 1946, the partnership sold five unimproved lots for a gain of $3,618.25, which it reported as ordinary income. (R. 31.)

In the 1944 partnership return, aside from income from sales and rental, the only other income items listed are interest income of $3,685.16 and forfeiture income of $25. In the 1945 partnership return, aside from income from sales and rental, the only other income items listed are interest income of $5,882.25 and forfeiture income of $150. In the 1946 partnership return, aside from income from sales, the only other income items listed are interest income of $7,794.36, rent of $745, and miscellaneous income of $53.14. (R. 31.)

All of the houses built by the partnership, single and multiple-unit houses, were financed as Title VI, F.H.A., 25-year, four and one-half percent, mortgage loans on individual houses and lots through the Glendale Federal Savings & Loan Association. (R. 31.)

From 1946 to December, 1951, Edgar and Daniel Cohn formed additional corporations for the purpose of building houses for sale. Houses built by these corpora-

tions, owned by the Cohn brothers, during this period include the following (R. 31-32):

Security Construction Company, Inc., was organized in 1941. In 1948 and 1949 it built and sold 365 single houses in Hawthorne, Lawndale and Torrance.

Keswick Corporation was organized in 1946. In 1946, it built in Toluca Lake, near Warner Brothers Studio, 12 four-unit houses which it rented and then sold in 1947, 1948, and 1949.

Orange Gardens was organized in 1947. In 1947 it built 11 apartments in North Long Beach, about 7 miles from the ocean. The apartments were rented immediately and are still rented. In 1950 it built and sold 124 single houses in Redondo.

D & E Corporation was organized early in 1946. It acquired land in Hawthorne, near Inglewood. In 1946 and 1947, it built and sold 84 single houses. In 1949 and 1950, it built and sold 59 single houses in Pacific Palisades. In 1950 and 1951, it built and sold 202 single houses in Redondo. In 1951, it was building 80 single houses.

Bonnie Brae Gardens was organized in 1947. In 1947 and 1948, it built 13 multiple-unit houses containing 46 apartment units in the Westlake area, near downtown Los Angeles. The apartments were rented and then sold in 1949 and 1950.

In addition to the above, Edgar and Daniel Cohn had a one-half interest in a partnership known as Construction Enterprises, organized in 1951, which partnership built 72 houses in the San Fernando Valley and sold them upon completion. (R. 32.)

From 1941, to December, 1951, Edgar and Daniel Cohn, through their various corporations and partnerships, have built at least 1,332 single- and multiple-unit houses. Of the buildings constructed, 1,225 were single family houses, and all were sold immediately upon completion. At least 107 of the buildings constructed were multiple houses. The only multiple-unit houses built by taxpayers, not sold, but still rented, are the 11 apartment buildings built by the Orange Gardens Corporation in North Long Beach. These 11 apartments are located near the ocean, about 35 miles from the 69 multiple houses sold in 1945, which, here, are in controversy. (R. 32-33.)

At least in January, 1944, Edgar Cohn was advised by the partnership's accountant about the Internal Revenue Code definition of capital assets, that in order to report gain from the sale or exchange of a capital asset as long term gain, the capital asset must be held more than six months, and that property held for sale to customers in the ordinary course of a trade or business is excluded from the Code definition of capital assets. The partnership's accountant pointed out to Edgar Cohn, that even though the partnership rented the multiple-unit houses constructed on tracts 13170 and 13171, if they were sold, a question might arise whether they were held for sale to customers or were capital assets, and the accountant, who took care of taxation matters for the partnership, advised Edgar to send him a letter "stating that they had determined to hold the buildings for investment so that there would be no question about it in the future if sale occurred." Edgar Cohn complied with the accountant's advice by sending him a letter dated January 12, 1944. (R. 33, 220-221.)

The ultimate findings of the Tax Court are as follows (R. 34-35):

> Prior to and during the taxable years, Security Construction Company—the partnership—was engaged in the business of building houses for sale. It did not, in 1944 or 1945, enlarge or change its business to that of renting residential property for investment, or enter into a new business of renting property to defense workers.
>
> It was originally intended to construct the 69 multiple-unit houses for sale under N.H.A. regulations, as well as the 109 single-unit houses. The 109 single-unit houses and the 69 multiple-unit houses constituted a single defense housing project, and the construction of the 69 multiple-unit houses was necessary in order to sell upon completion, without first renting, the 109 single-unit houses. The renting of the 69 multiple-unit houses was required by N.H.A. regulations and was only incidental to selling them. The 69 houses were held during 1944 and 1945 primarily for sale to customers in the ordinary course of the partnership's business of building and selling houses. They were rented only until it was profitable to sell. The 109 single-unit houses were held primarily for sale to customers in the ordinary course of the partnership's business of building and selling houses.
>
> The 69 multiple-unit houses were not capital assets. The gain realized in 1945 and 1946, on the installment basis, from the sale thereof in 1945 constituted ordinary income rather than long-term capital gain.

SUMMARY OF ARGUMENT

The sole question presented in this case is whether the profit realized from the sale of the 69 multiple unit houses in 1945 should be taxed as ordinary income or as capital gain. The profit should be taxed as ordinary income if the houses were held by the taxpayers primarily for sale to customers in the ordinary course of the partnership's business within the meaning of Section 117 (a) and (j) of the Internal Revenue Code. The Tax Court found that the 69 units in question here were held by the partnership in 1944 and 1945 primarily for sale to customers in the ordinary course of its business of building and selling houses, and therefore the gain realized on their sale was taxable as ordinary income. Whether the property was so held is, of course, a question of ultimate fact, no single circumstance being conclusive, and the Tax Court's finding to that effect should not be disturbed unless clearly erroneous. Therefore, we need only determine whether that finding is supported by the record.

Taxpayers contend that they were in the dual business of building houses for sale and rental. However, we submit that in the light cast by the Tax Court's application of the various guides, which have been helpful in like cases, it was fully warranted in finding that the partnership was engaged in the business of building houses for sale and that it did not in 1944 or 1945 enlarge or change its business to that of renting residential property or enter into a new business of renting property to defense workers. Under the circumstances it is clear that there is sufficient evidence in the record that the 69 multiple-unit houses were held primarily for sale to customers in the ordinary course of the part-

nership's business within the meaning of Section 117 (a) and (j) of the Code.

ARGUMENT

There Is Ample Evidence in the Record to Support the Tax Court's Finding That the 69 Multiple-unit Houses in Question Were Held by the Taxpayers in 1944 and 1945 Primarily for Sale to Customers in the Ordinary Course of the Partnership's Business Within the Meaning of Section 117 (a) and (j) of the Internal Revenue Code

In 1945, the taxpayers sold 69 multiple-unit houses located in the area called Beautiful Glenwood which is near Burbank, California. The taxpayers reported the $238,329 in profits they realized from the sales in their returns for 1945 and 1946 on the installment method as long-term capital gain. On September 27, 1947, the Commissioner determined deficiencies against the taxpayers for the years 1945 and 1946, on the ground that the profits derived from the sale of the 69 multiple-unit houses constituted ordinary income rather than capital gain since the units were held primarily for sale to customers in the ordinary course of the taxpayers' business. The taxpayers petitioned the Tax Court for a redetermination of the assessed deficiencies and that court found (R. 34-35):

> Prior to and during the taxable years, Security Construction Company—the partnership—was engaged in the business of building houses for sale. It did not, in 1944 or 1945, enlarge or change its business to that of renting residential property for investment, or enter into a new business of renting property to defense workers.

* * * *

> The 69 multiple-unit houses were not capital assets. The gain realized in 1945 and 1946, on the installment basis, from the sale thereof in 1945 constituted ordinary income rather than long-term capital gain.

It concluded that the 69 multiple-unit houses were held primarily for sale to customers in the ordinary course of the partnership's business of building and selling houses in 1944 and 1945, and were not at any time capital assets and sustained the Commissioners' deficiency determination.

This Court has been confronted with the question of whether property was "property held * * * primarily for sale to customers in the ordinary course of his trade or business," under subsections (a) and (j) of Section 117, Internal Revenue Code (Appendix, *infra*), in an impressive array of cases. *McGah* v. *Commissioner*, 210 F. 2d 769; *Jones* v. *Commissioner*, 209 F. 2d 415; *Palos Verdes Corp.* v. *United States*, 201 F. 2d 256; *McGah* v. *Commissioner*, 193 F. 2d 662; *Rollingwood Corp.* v. *Commissioner*, 190 F. 2d 263; *Rubino* v. *Commissioner*, 186 F. 2d 304, certiorari denied, 342 U. S. 814; *Field* v. *Commissioner*, 180 F. 2d 170; *Ehrman* v. *Commissioner*, 120 F. 2d 607; *Richards* v. *Commissioner*, 81 F. 2d 369. The question to be decided is essentially one of fact and a trial court's finding that property was so held by a taxpayer is not to be disturbed unless clearly erroneous. *Rollingwood Corp.* v. *Commissioner, supra; Rubino* v. *Commissioner, supra.*

As this Court and others have often pointed out, there is no fixed formula or rule of thumb for determining whether property sold by a taxpayer was held by

him primarily for sale to customers in the ordinary course of business. Each case must, in the last analysis, rest on its own peculiar facts. There are, however, certain factors which have been recognized as helpful guides in ascertaining the correct result. Among those are (1) the purpose for which the property was acquired (2) the frequency and continuity of sales as opposed to isolated transactions (3) the activities of the taxpayer and those acting in his behalf or under his direction in conducting a sales campaign either through advertisements or the employment of real estate agents, and (4) the substantiality of the transactions.

In the case at bar, taxpayers, well aware of the aforementioned factors, base their argument on the contention that during the years involved here they were engaged in the dual activity of building houses for sale and investment purposes. (Br. 17-30, 37-41.) While it is, of course, possible to be engaged in the conduct of more than one business, each case in the end must be judged on its own facts. Indeed, as this Court pointed out in the *Rollingwood* case, *supra* (p. 266), most cases dealing with the problem of whether property was held primarily for sale to customers in the ordinary course of his trade or business involve a situation where the taxpayer is engaged in some activity apart from his usual occupation and the question is whether that activity constitutes a business. Here, however, we are not confronted with such a situation for the taxpayers did not engage in a different activity apart from their usual business occupation of building houses for sale.

We maintain, as the Tax Court found, that the housing units were built with the intention of selling them

to customers even though they were being rented until favorable conditions warranted sales. There is ample evidence to sustain the Tax Court's finding that the taxpayers held the 69 units in question during 1944 and 1945 "primarily for sale to customers in the ordinary course of the partnership's business of building and selling houses" (R. 34-35) within the meaning of Section 117 (j) of the Code.

The record discloses that the partnership, involved in the instant case, was in active existence from May 21, 1942, until about the first of April, 1946. During that period of time it built and sold 324 houses, of which 253 were single-unit houses and 71 multiple-unit houses. A breakdown of the foregoing total, 21 houses sold in 1942, 109 in 1943, 109 in 1944, 69 in 1945 and 16 in 1946, effectively disposes of any contention that might be advanced that the sales under consideration here were isolated or casual transactions.[3] With the sole exception of the 69 multiple-unit houses none of the houses were rented but all were sold immediately upon their completion and the gain resulting from their sale was reported by the taxpayers as ordinary income.[4] (R. 20-21, 53-55, 267-268.)

A close scrutiny of the reasons underlying the construction of the apartments demonstrates even more

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[3] The 69 multiple units were sold over a period of only 10 months, the sales starting approximately 6 months after the last unit was completed. (R. 26, 29.)

[4] It is noteworthy that from December, 1941, until December, 1951, taxpayers, through their various corporations and partnerships, constructed at least 1,332 houses, of which number 1,225 were single-unit houses sold immediately upon completion; 107 were multiple-unit houses of which number only the 11 built by the *Orange Gardens Corporation* were held as rental property on December 5, 1951. The latter apartments are located 35 miles from the 69 units in question here. (R. 31-33, 327-344.)

clearly that the partnership was at all times in the business of building houses for sale and negates any idea that the 69 multiple-unit houses were erected as long term investment property. Due to wartime restrictions the partnership in 1943 had to obtain priorities for construction materials in order to continue its business of building houses. Upon inquiry Edgar M. Cohn was informed by the F.H.A. that priorities were only being granted for the construction of multiple-unit houses. (R. 21-22, 215-216, 250-251.) Therefore, the original intent of the partnership to build single houses was temporarily shelved and an application was filed for priorities to build 56 multiple-unit houses on tract 13170. The application was granted on July 17, 1943. However, before construction began the F. H. A. on August 25, 1943, enlarged the classification of defense housing to include single-unit houses and amended its basic order (N.H.A. Order No. 60-3 (R. 175-183)) by means of N.H.A. General Order No. 60-3B (R. 184-194) which permitted a builder to sell one-third of its houses to defense workers, without first renting them provided the sale was made within 15 days after completion (R. 23-24, 250-251).

Subsequent to the above mentioned amendment, the partnership in September, 1943 applied for priorities to build houses on tract 13171, and its application was approved in the middle of December, 1945.[5] Taxpayers at that time knew that by treating the construction on tracts 13170 and 13171 as one project they would be able to sell one-third of the total units upon completion

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[5] Taxpayers however did not purchase tract 13170 or 13171 until an appreciable time after priorities had been granted to build on the individual tracts. (R. 23-26, 53-54, 251-253.)

to war workers. Moreover, they also realized that in order to construct the 109 single-unit houses they were required to build the 69 multiple-unit houses here in question.[6] (R. 25-26, 253-254, 265-266.) By erecting the multiple-unit houses the partnership did not remove itself from the business of building houses for sale for the 69 houses could be sold upon completion to non-occupants subject, however, to the then prevailing restrictions. The partnership was fully aware of this for Edgar Cohn testified that the 69 houses could be sold at any time. (R. 306.) If actualities are to be considered, the rental of the units rather than precluding their sale made the property even more desirable in the eyes of potential buyers for the latter on purchase need only collect the rents from the tenants.

As we have have seen the evidence points convincingly to the fact that 69 multiple-unit houses were constructed by the partnership in the ordinary course of its business of building houses for sale. Therefore, in the light of the foregoing, there is ample evidence to support the Tax Court's finding that (R. 40):

> At best, the evidence, in our opinion shows merely a dual purpose, namely, to rent the multiple-unit houses until such time as it would be profitable and convenient to sell them. In that situation it must be concluded that "one of the essential purposes (in acquiring or holding the houses) is the purpose of sale," *Rollingwood Corp.* v. *Commis-*

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[6] As of December 17, 1943, the partnership was authorized to construct 178 houses comprising 319 units. It appears that the N.H.A. gave its approval to the partnership to treat the 109 single family houses as one-third and the 210 units contained in the 69 multiple-unit houses as two-thirds of the project to be erected on tracts 13170 and 13171. (R. 25-26.)

sioner, supra, and the profit on sale cannot be treated as capital gain.

Cf. *McGah* v. *Commissioner,* 210 F. 2d, p. 771.

Cumulative support for the Tax Court's finding that the partnership was in the business of building and selling houses in 1944 and 1945, is to be found in the efforts employed by the partnership to make sales which is indistinguishable from that employed by people engaged in the business of selling real estate. The pattern established by the partnership in selling its other houses was adhered to here. It employed real estate brokers who were guaranteed a certain specified amount or percentage of the amount received for the houses. The partnership's desire to sell the 69 multiple-unit houses was so intense that it changed real estate brokers in 1945 when taxpayers considered that sales were moving at too slow a pace. (R. 28-29, 229, 275-276.)

While taxpayers admit that advertisements were placed in newspapers, advertising their single-unit houses for sale (R. 261), the advertising of the 69 multiple-unit houses, outside of that done by the brokers (R. 229) was confined to two billboards adjacent to the sales office owned and maintained by the partnership (R. 260). The sales office was located next to the partnership's office on a plot of ground bordering tract 13170 on which 56 of the units were erected. (R. 259-260, 311.) This sales office was occupied rent-free by the brokers selling the apartment building and it was their custom to have a man on duty there a considerable amount of the time. (R. 28, 276-278.) It is also important to note that one of the partners, Edger Cohn, assisted the brokers at various times in selling the 69 multiple-unit buildings. (R. 264-265, 281.) As a result,

we submit that the partnership was at all times in the business of building and selling real estate.

Taxpayers made an argument (Br. 30-33) to the effect that they as prudent investors only liquidated their investment out of fear that they would lose many of their tenants when Lockheed Aircraft cut production and employees. This Court considered a similar argument in *Palos Verdes Corp.* v. *Commissioner, supra,* p. 259, and rejected it as being without substance. The Court said:

> The evidence indicates to us that the owner was not in the real estate business by choice, but because it offered the way to dispose of the property which, to use an old expression, "was eating its head off" through expenses of holding it. *The owner did, however, resort to a method of disposal which in fact required that the property be submitted to customers in the ordinary course of trade or business of real estate.* (Italics added.)

See *Home Co.* v. *Commissioner,* 212 F. 2d 637 (C. A. 10th);[7] and *Dillon* v. *Commissioner* (C. A. 8th), decided June 4, 1954 (1954 C.C.H., par. 9429).

Also indicating that the partnership was engaged only in the business of building and selling houses as contrasted to taxpayers' contention that the partnership

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[7] The Tenth Circuit said in the *Home Co.* case, *supra* (p. 641):

> One may, of course, liquidate a capital asset. To do so it is necessary to sell. The sale may be conducted in the most advantageous manner to the seller and he will not lose the benefits of the capital gain provision of the statute, unless he enters the real estate business and carries on the sale in the manner in which such a business is ordinarily conducted. In that event, the liquidation constitutes a business and a sale in the ordinary course of such a business and the preferred tax status is lost.

was engaged in a dual business of building houses for sale and investment is the substantiality of its transactions. As we have seen the partnership's transactions were substantial in number for it sold all the buildings that it erected. Further, they were substantial from the standpoint of financial return. While it is true that the "disparity between income from sales and from rentals is not controlling" (*Delsing* v. *United States,* 186 F. 2d 59, 61 (C. A. 5th)), ordinarily a taxpayer whose primary interest in real estate is investment income, or rentals, would be expected to receive more income from rentals than from sales. Accordingly, one of the tests sometimes applied to distinguish an investor from a dealer is a comparison of rental income to sales income.

In the case at bar the partnership during the period of its active existence received the following profits from sales and rentals (R. 21, 352-362):

Year	Profits from Sales	Net Rentals
1942	$15,035	—
1943	73,349	—
1944	111,436	$28,793
1945	238,329	8,425
1946	64,835	745

In 1944 and 1945, the partnership received net rental income of $37,218 from the 69 multiple-unit houses. The partnership realized a profit of $238,329 from the sale of the aforementioned buildings in 1945, after deducting all expenses not allocated to rentals in the 1945 partnership return. (R. 118-128.) The ratio of profits of sales income to total rental income from the 69 multiples is therefore six to one. In the taxable year 1945,

the ratio net profits of $238,329 from sales, to $8,425 for rentals was of 28 to 1. The overwhelming ratio of sales income to rental income during the partnership's active existence shows quite conclusively we believe that all the housing units were held primarily for sale to customers in the ordinary course of its business and that the rental of the 69 housing units was only incidental thereto.

Taxpayers' reliance upon the decisions of this Court in the *McGah* cases, *supra;* and *Victory Housing No. 2* v. *Commissioner,* 205 F. 2d 371 (C. A. 10th); and in *Dillon* v. *Commissioner, supra,* is misplaced due to obvious factual differences. The *McGah* cases are distinguishable from the instant case in that (1) there from the very inception of the partnership business the idea of constructing houses for rental purposes was the dominating and controlling motive; and (2) there the decision to sell the rental units was not voluntarily made but was the result of a bank's demand for payment of part of the money owed it by the taxpayer.

In the *Victory Housing* case, taxpayer was not engaged in the business of constructing units for sale to customers, as here, but rather from its very formation was engaged solely in the rental business. There, taxpayer did not actively engage in the real estate business as was done by taxpayers in the case at bar but only sold the houses when desiring purchasers came to it, inquired about them and requested to make a purchase.

Here, the fact that the partnership admittedly built the 69 multiple-unit houses so that it could build and sell the 109 single-unit houses plus the fact that the Tax Court found on the strength of the whole record

that the apartments were during 1944 and 1945 held for sale to customers, distinguishes the instant proceeding from the *Dillon* case, *supra,* where the Tax Court found that the houses were built and held for rental purposes up to the date they were sold, and the record failed to disclose that taxpayer's business was other than the liquidation of his ownership in the 20 rental units.

As we have previously said, the question of whether or not property was held primarily for sale to customers in the ordinary course of the partnership's business is a question of ultimate fact, each case having in the last analysis to turn on its own peculiar facts. Furthermore, it is not a question of whether one case can be distinguished from another but rather whether there is sufficient evidence to support the Tax Court's finding that the partnership held the 69 units in question primarily for sale to customers in the ordinary course of its business.

Under the circumstances, it is clear that the Tax Court has not erred in this case. It considered the crucial question as being whether at the time of sale the partnership held the 69 multiple-unit houses in question primarily for sale to customers in the ordinary course of its trade or business within the meaning of Section 117 (j) of the Code. Considering the attending facts and circumstances, the Tax Court was amply justified in finding that the partnership at all times so held the apartments and, accordingly, in deciding that the gain realized on their sale was taxable as ordinary income rather than as long-term capital gain.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

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Assistant Attorney General.

Ellis N. Slack,
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John J. Kelley, Jr.,
Special Assistants to the Attorney General.

August, 1954.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income * * * from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1);

* * * *

(j) [as added by Sec. 151 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Sec. 127 (b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Gains and Losses from Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarliy for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k)(1) or (2) is applicable.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sale or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such

sales exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.117-1. *Meaning of Terms.*—The term "capital assets" includes all classes of property not specifically excluded by section 117(a)(1). In determining whether property is a "capital asset," the period for which held is immaterial.

The exclusion from the term "capital assets" of property used in the trade or business of a taxpayer of a character which is subject to the allowance for depreciation provided in section 23 (l) and of real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. Gains and losses from the sale or exchange of such property are not subject to the percentage provisions of section 117 (b) and losses from such transactions are not subject to the limitations on losses provided in section 117 (d), except that under section 117 (j) the gains and losses from the sale or exchange of such property held for more than six months may

be treated as gains and losses from the sale or exchange of capital assets, and may thus be subject to such limitations. See sections 29.117-7. Property held for the production of income, but not used in a trade or business of the taxpayer, is not excluded from the term "capital assets" even though depreciation may have been allowed with respect to such property under section 23 (l) prior to its amendment by the Revenue Act of 1942. However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business, as in the case of a dealer in real estate, is not subject to the limitations of section 117 (b), (c), and (d). The term "ordinary net income" as used in these regulations for the purposes of section 117 means net income exclusive of gains and losses from the sale or exchange of capital assets.

* * * *

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No. 14222

United States
Court of Appeals
for the Ninth Circuit.

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,

Appellant,

vs.

CLIFTON C. PIERCE and EILEEN E. PIERCE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-12-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Southern District of California, Central Division

No. 14,612-WB

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a Corporation,

Plaintiff,

vs.

CLIFTON C. PIERCE, EILEEN E. PIERCE, JOHN DOE, JANE DOE and RICHARD ROE CORPORATION, a Corporation,

Defendants.

COMPLAINT

(Breach of Contract and Money Had and Received)

Comes now plaintiff and complains of the defendants and for cause of action alleges:

I.

That plaintiff is a corporation incorporated under the laws of the State of Delaware. That the defendants are citizens of the State of California, and that there is thus a diversity of citizenship between plaintiff and defendants.

II.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars, to wit, the sum of Three Thou-

sand Four Hundred Sixteen and 66/100 ($3,416.66) Dollars.

III.

That the defendants John Doe, Jane Doe and Richard Roe Corporation, a corporation, are sued herein under fictitious names, their true names being at this time unknown, and plaintiff prays that when their true names are affirmed that it may have leave of court to amend this complaint to insert said true names [2*] in place and stead of said fictitious names.

IV.

That on or about the 5th day of January, 1952, the defendants in writing accepted an offer of the plaintiff dated December 28, 1951, for the sale and exchange of certain real and personal property. That said agreement included the transfer from defendants to plaintiff of certain water, water rights, ditches, ditch rights, ditch shares, ranch rights, pasture rights and all rights of every kind and nature appurtenant to, appertaining to or attaching to the real property then belonging to defendants, and which said defendants exchanged pursuant to the contract and transfer to this plaintiff. That among the appurtenant rights being transferred with said real property from defendants to plaintiff were One Thousand One Hundred Twenty-one and 3/9 (1,121 3/9) shares of the Old Channel Ditch Company stock and Two Thousand Eight Hundred Fifty-six (2,856) shares of Young Ditch Company stock.

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

It was further provided in said agreement that all expenses affecting said property being transferred from defendants to plaintiff should be prorated as of the date the exchange was completed and consummated, which was defined as the closing date of the escrow.

V.

That on or about the 7th day of January, 1952, the plaintiff and defendants executed escrow instructions to the California Bank, Beverly Hills Office, Beverly Hills, California, for the purpose of consummating the said agreement and, among other things, it was provided in said escrow instructions that the said instructions were not in any way to be construed to alter, supersede, cancel or change the previous agreement of the parties heretofore referred to. That said escrow was completed and closed, and the documents transferring title of various properties therein exchanged were recorded on April 9, 1952.

VI.

That on or about the 27th day of March, 1952, at a special meeting of the board of directors of the Young Ditch Company, a corporation, an assessment of One ($1.00) Dollar per share was levied on the outstanding capital stock of said corporation. Notice of assessment was thereafter sent to stockholders of said corporation under date of March 27, 1952, specifying that any stock upon which the [3] assessment remained unpaid on May 15, 1952, would be delinquent and advertised for sale at public auction, and would be sold to pay any delinquent as-

sessment together with any cost of advertising or expenses of sale.

That the assessment on the shares of the Young Ditch Company stock, a corporation, transferred from the defendants to the plaintiff pursuant to the agreement heretofore described, amounted to the sum of Two Thousand Eight Hundred Fifty-six and no/100 ($2,856.00) Dollars, being One ($1.00) Dollar per share for the Two Thousand Eight Hundred Fifty-six and no/100 (2,856) shares of said stock.

VII.

That on or about the 7th day of April, 1952, at a meeting of the board of directors of the Old Channel Ditch Company, a corporation, an assessment of fifty (50) cents per share was levied upon the outstanding capital stock of the said corporation. Notice of assessment was thereafter sent to stockholders of said corporation under date of April 10, 1952, specifying that any stock upon which the assessment remained unpaid on May 15, 1952, would be delinquent and advertised for sale at public auction and would be sold to pay any delinquent assessment together with any costs of advertising or expenses of sale.

That the assessment on the shares of stock of the Old Channel Ditch Company, a corporation, transferred from the defendants to the plaintiff pursuant to the agreement heretofore described amounted to the sum of Five Hundred Sixty and 66/100 ($560.66) Dollars, being Fifty (50) cents per share

for the One Thousand One Hundred Twenty-one and 3/9 (1,121-3/9) shares of said stock.

VIII.

That on or about the 14th day of April, 1952, plaintiff in writing notified the defendant Clifton C. Pierce of the assessment theretofore made by the Young Ditch Company in the sum of Two Thousand Eight Hundred Fifty-six and no/100 ($2,856.00) Dollars, and demanded of said defendants that they remit to plaintiff the sum of Two Thousand Eight Hundred Fifty-six and no/100 ($2,856.00) Dollars in order that the said plaintiff could pay assessment theretofore levied by the said Young Ditch Company and release said stock of the lien placed upon it by reason of said assessment. That on or about the 16th day of April, 1952, plaintiff, having received no reply to its demand upon the defendants that they pay the said [4] assessment of the Young Ditch Company in order not to become delinquent in the payment of said stock and in order not to have such stock sold at public auction and thus lose said appurtenant stock, paid to the said Young Ditch Company the sum of Two Thousand Eight Hundred Fifty-six and no/100 ($2,856.00) Dollars in payment of said assessment.

IX.

That on or about the 29th day of April, 1952, plaintiff in writing notified the said Clifton C. Pierce of the assessment theretofore made by the Old Channel Ditch Company in the sum of Five

Hundred Sixty and 66/100 ($560.66) Dollars and demanded of said defendants that they remit to the plaintiff the sum of Five Hundred Sixty and 66/100 ($560.66) Dollars together with the sum of Two Thousand Eight Hundred Fifty-six and no/100 ($2,-856.00) Dollars, being the assessment of the Young Ditch Company stock, in order that said plaintiff might pay said assessments and release said stock of the lien placed upon the said stock by reason of said assessments. That on or about the 1st day of May, 1952, plaintiff having received no reply to its demand upon the defendants that they pay the said assessments of the Old Channel Ditch Company, in order not to become delinquent in the payment of said stock and in order not to have such stock sold at public auction and thus lose said appurtenant stock, paid to the Old Channel Ditch Company the sum of Five Hundred Sixty and 66/100 ($560.66) Dollars in payment of said assessment.

X.

That on or about the 12th day of June, 1952, and again on or about the 25th day of July, 1952, the plaintiff in writing demanded of the said defendants that they pay to the plaintiff the sum of Three Thousand Four Hundred Sixteen and 66/100 ($3,-416.66) Dollars, being the total of the two assessments theretofore levied and paid by the said plaintiff in order to free the stock transferred to the plaintiff from the defendants pursuant to their written agreement of January 5, 1952.

XI.

That said defendants have failed, neglected and refused to pay the said sum of Three Thousand Four Hundred Sixteen and 66/100 ($3,416.66) Dollars, or any part thereof, and there is now due, owing and unpaid to the plaintiff the said sum of Three Thousand Four Hundred Sixteen and 66/100 ($3,416.66) Dollars from the said [5] defendants.

For a Second, Separate and Distinct Cause of Action, Plaintiff Alleges

I.

That paragraphs I, II and III of its first cause of action are incorporated herein by reference as though set forth in full.

II.

That the defendants owe plaintiff the sum of Three Thousand Four Hundred Sixteen and 66/100 ($3,416.66) Dollars for moneys had and received from the said plaintiff in the amount of Two Thousand Eight Hundred Fifty-six and no/100 ($2,856.00) Dollars on or about the 16th day of April, 1952, and the sum of Five Hundred Sixty and 66/100 ($560.66) Dollars on or about the 1st day of May, 1952.

III.

That although demand has been made of the defendants by the plaintiff for the said sum of Three Thousand Four Hundred Sixteen and 66/100 ($3,416.66) Dollars, the defendants have failed, neglected and refused to pay the said sum of Three

Thousand Four Hundred Sixteen and 66/100 ($3,-416.66) Dollars, or any part thereof, and there is now due, owing and unpaid from said defendants to the plaintiff the sum of Three Thousand Four Hundred Sixteen and 66/100 ($3,416.66) Dollars.

Wherefore, plaintiff prays judgment against the defendants, and each of them, for the sum of Three Thousand Four Hundred Sixteen and 66/100 ($3,-416.66) Dollars together with interest thereon from the 1st day of May, 1952, for costs of suit incurred herein, for such other and further relief as may be proper in the premises.

MACFARLANE, SCHAEFER & HAUN,

RAYMOND V. HAUN,

HENRY SCHAEFER, JR.,

E. J. CALDECOTT,

By /s/ E. J. CALDECOTT,
Attorneys for Plaintiff.

[Endorsed]: Filed October 16, 1952. [6]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come Now, defendants, Clifton C. Pierce and Eileen E. Pierce, separating themselves from their co-defendants herein, and answering for themselves alone, admit, deny, and allege as follows:

I.

Answering paragraph II of plaintiff's alleged first cause of action, these answering defendants have no information or belief on the subject sufficient to enable them to answer and placing their denial upon said ground denies generally and specifically each and every allegation in said paragraph contained.

II.

Answering paragraph IV of plaintiff's alleged first cause of action, these answering defendants have no information or belief on the subject sufficient to enable them to answer those allegations contained in lines 14 to 17, inclusive, of said paragraph [7] and placing their denial on said ground deny generally and specifically each and every allegation contained in said portion of said paragraph.

III.

Answering paragraph V of the alleged first cause of action these answering defendants allege that it was further provided in said escrow instructions executed by the parties, among other things, that the property involved was to be transferred subject to all taxes and assessments levied or assessed subsequent to the date of said instructions.

IV.

Answering paragraphs VI and VII of the alleged first cause of action these answering defendants have no information or belief on the subject sufficient to enable them to answer the allegations con-

tained in said paragraphs, and placing their denial upon said ground deny generally and specifically each and every allegation in said paragraphs contained.

V.

Answering paragraph VIII of plaintiff's alleged first cause of action these answering defendants admit that plaintiff demanded of defendants that they remit to plaintiff the sum of $2,856.00; further answering, these defendants have no information or belief sufficient to enable them to answer as to whether or not plaintiff paid the said assessment of the Young Ditch Company, and placing their denial upon such information and belief deny said allegation and except as otherwise admitted herein deny generally and specifically each and every other allegation contained in said paragraph.

VI.

Answering paragraph IX of the alleged first cause of action, these answering defendants admit that plaintiff demanded of the defendants that they remit to the plaintiff the sum of [8] $560.66 together with the sum of $2,856.00; further answering, these defendants have no information or belief sufficient to enable them to answer as to whether or not plaintiff paid the said assessment of the Old Channel Ditch Company and placing their denial upon such information and belief deny said allegation and except as otherwise admitted herein deny generally and specifically each and every other allegation in said paragraph contained.

VII.

Answering paragraph X of the alleged first cause of action, these answering defendants admit that plaintiff demanded of them that they pay to plaintiff said amount. Further answering the said paragraph, save and except as expressly admitted herein, these answering defendants deny generally and specifically each and every allegation in said paragraph contained.

VIII.

Answering paragraph XI of the alleged first cause of action these answering defendants admit that they have failed and refused to pay the said sum of $3,416.66 or any part thereof. Further answering the said paragraph, save and except as expressly admitted herein, these answering defendants deny generally and specifically each and every allegation in said paragraph contained; and particularly and expressly do they deny that there is now due, owing or unpaid to plaintiff from these answering defendants the sum of $3,416.66 or any other sum or sums whatsoever, or at all.

For Answer to the Alleged Second Cause of Action in Said Complaint, These Answering Defendants Admit, Deny and Allege as Follows:

I.

Answering paragraph I thereof these answering defendants refer to each, every and all of their answers to paragraphs I, II, and III of the alleged first cause of action contained in the complaint and

by reference thereto incorporate the same [9] herein in the same manner and with like force and effect as if the same were fully set forth herein verbatim.

II.

Answering paragraph II thereof these answering defendants deny generally and specifically each and every allegation in said paragraph contained, and the whole thereof; and particularly and expressly do they deny that these answering defendants owe to plaintiff the sum of $3,416.66 or the sum of $560.66 or any other sum or sums whatsoever, or otherwise, or at all.

III.

Answering paragraph III thereof, these answering defendants admit a demand by plaintiff and admit that they have failed and refused to pay said sum of money or any part thereof. Further answering the said paragraph, save and except as expressly admitted herein, these answering defendants deny generally and specifically each and every allegation in said paragraph contained; and particularly and expressly do they deny that there is now due, owing or unpaid the sum of $3,416.66 from defendants to plaintiff or any other sum or sums whatsoever, or otherwise, or at all.

Wherefore, having fully answered, these answering defendants pray that plaintiff take nothing by reason of its complaint herein and that these answering defendants be hence dismissed with their costs of suit incurred herein and for such other

and further relief as to the court may seem meet and proper in the premises.

/s/ JOSEPH D. FLAUM,
Attorney for Answering
Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 15, 1952. [10]

[Title of District Court and Cause.]

STIPULATION OF FACT

It Is Hereby Stipulated by and between the parties hereto, by their respective attorneys:

(1) That on or about January 5, 1952, the defendants in writing accepted an offer of the plaintiff dated December 28, 1951, for the sale and exchange of certain real and personal property. A true copy of said offer and acceptance (lacking certain exhibits attached thereto, but irrelevant to this litigation) is attached hereto, entitled "Exchange agreement" and marked Exhibit "A."

(2) On or about January 7, 1952, the parties hereto executed escrow instructions to the California Bank, Beverly Hills Office, Beverly Hills, California, for the purpose of consummating the said sale and exchange. A true copy of said escrow instructions is attached hereto marked Exhibit "B." [12]

(3) Said escrow was completed and closed, and the documents transferring title of the various properties therein exchanged were recorded on April 9, 1952.

(4) The allegations of paragraphs I, II, VI, VII, VIII, IX and X of the complaint are true.

(5) The funds obtained by the Old Channel Ditch Company and the Young Ditch Company as a result of the assessments referred to in paragraphs VI through X of the complaint were used by said companies to pay for the removal of certain willow trees and debris, and otherwise to clean out ditches and water channels for the benefit of the Nevada property which was the subject of said escrow, and for the other properties to which stock in said ditch companies was appurtenant. Assessments for this purpose are made by said companies at irregular intervals, generally not less than three years nor more than five years apart; but for the purposes of this litigation it is hereby stipulated that said assessments shall be considered to be made every four years.

(6) This Stipulation of Fact is solely for the purpose of agreeing as to the existence of the fact, and each party reserves the right, on any trial of the action or in any motion or other proceeding before the Court, to object to any such evidence on any legal ground therefor and to argue the materiality as well as the weight to be given any such evidence in any such trial motion or proceeding before the Court.

Dated: February 20, 1953.

MACFARLANE, SCHAEFER & HAUN,

By /s/ E. J. CALDECOTT,
Attorneys for Plaintiff.

JOSEPH D. FLAUM,

WALTER L. BRUINGTON and

WALTER L. M. LORIMER,

By /s/ WALTER L. M. LORIMER,
Attorneys for Defendants. [13]

EXHIBIT A

Exchange Agreement

This Exchange Agreement Witnesseth:

That the undersigned Metropolitan Finance Corporation of California, of Pacific Palisades, County of Los Angeles, State of California, hereinafter called the First Party, hereby offers to exchange the following described real and personal property situated in the County of Los Angeles, State of California, to wit:

Item 1—That certain parcel of income residential real property consisting of lot and four-flat building situated on Beverly Glen Blvd., between Tennessee Street and Olympic Blvd., and legally described as:

Lot 4 in Block 16 of Tract No. 7260, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 78, Pages 64 and 65 of Maps, in the office of the County Recorder of said County.

On the above-described property there exists a current indebtedness in the amount of $12,-979.24 payable $160 per month including interest at the rate of 5% per annum, until paid, and evidenced by a First Deed of Trust held by the Western Federal Savings & Loan Association, said encumbrance to be assumed by Second Parties. This loan can be paid in full on any payment date by paying three months' interest on the balance due at that time. Said Item 1 property is being offered on a basis of $26,500.

Item 2—That certain parcel of residential real property consisting of two and a fraction lots and dwelling house situated at 15000 La Cumbre Drive, Pacific Palisades, and legally described as:

Parcel 1: Lots 13 and 14 in Block 4 of Tract 9377, in the City of Los Angeles, as per map recorded in Book 129, Pages 3 to 7 of Maps, in the office of the county recorder of said county.

Parcel 2: That portion of Lot 12 in Block 4 of said Tract 9377, described as follows:

Beginning at the most easterly corner of Lot 14 in said Block 4; thence South 7° 49′ 48″ East 135.36

feet, more or less, to a point in the curved Southerly line of said Lot 12, distant Westerly thereon 25 feet from the Southeasterly corner thereof; thence Westerly along said Southerly line 75 feet to the Southwesterly corner of said Lot 12; thence North 14° 37′ 50″ West along the Westerly line of said Lot 12, for a distance of 110 feet to the most Westerly corner thereof; thence North 62° 57′ 30″ East along the Northerly line of said Lot 12, for a distance of 85 feet to the point of beginning.

The above described Item 2 property is to be delivered free and clear of all encumbrances except those [14] specified herein. Said Item 2 property is being offered on a basis of $68,500. Both above described Item 1 and Item 2 properties are subject to all restrictions, taxes, reservations, easements, rights, rights-of-way, conditions and covenants of record, if any.

Item 3—Those certain items of personal property consisting of furniture, furnishings, rugs, carpets, drapes and other household effects, equipment, etc., as shown on an inventory list attached hereto and made a part hereof, and designated as Exhibit "A." Said personal property to be delivered free and clear of all encumbrances. Said Item 3 personal property is being offered on a basis of $16,000.

Item 4—In addition to its real and personal property hereinbefore described, First Party agrees to deposit into hereinafter named escrow within its time period the sum of $12,979.24 in

cash, or less if payments have been made on account of principal of the note described under Item 1, said sum to be paid to the Second Parties under the terms and conditions set forth herein,

for the real and personal property owned by Clifton C. Pierce and Eileen E. Pierce, husband and wife, of the County of San Diego, State of California, hereinafter and hereinbefore called the Second Parties, situated in the Counties of Pershing and Lander, State of Nevada, to wit.

Item 1—That certain parcel of ranch real property consisting of 1,999.07 acres of land, more or less, together with and including all the improvements thereon, situated about two and one half miles North of the City of Lovelock, Nevada and legally described as:

Township 27 North, Range 31 East, M.D.M.

Section 3: All.
Section 4: SE¼; Lots 1 and 2.
Section 10: Fractional part of the N½, and that portion of the SW¼ of said section lying North of the Old Channel Ditch.

Township 28 North, Range 31 East, M.D.M.

Section 26: E½ of E½.
Section 33: E½ of NE¼; SE¼.
Section 34: All.

Subject To all existing reservations, covenants,

taxes, conditions, easements, restrictions, rights-of-way of record, if any.

On the above-described property (Pierce's Item 1) there exists the following encumbrances: (1) An indebtedness in the amount of $50,000 payable $2,500 per year plus interest at the rate of four and one half per cent per annum, until paid, and evidenced by a First Deed of [15] [Trust held by the Prudential Insurance Company of America; (2) There is also another existing indebtedness in the amount of approximately $42,000, payable $10,000 on or before November 1st, 1952, and the remaining $32,000 payable on or before April 1st, 1955, and drawing interest at the rate of 5% (five per cent) per annum (interest payable semi-annually) and is to be evidenced by a Second Deed of Trust. Both of the above-named encumbrances are to be assumed by the First Party.]

[The foregoing bracketed matter appeared as an alteration on the original. (Stamped: Metropolitan Finance Corporation of Calif., /s/ E. S. Shipp. Initialed: H.O.M., C.C.P. and E.E.P.)]

Item 2—Those certain items of personal property consisting of tractors, trucks, farm machinery, equipment, hay, household furnishings and equipment, etc., as shown on an inventory list attached hereto and made a part hereof and designated as Exhibit "B." Said personal property to be delivered free and clear of all encumbrances.

[Item 3—Second Parties agree to deliver, transfer and convey all water, water rights, ditches, ditch rights, ditch shares, range rights, pasture rights, and all rights of every kind and nature appurtenant to, appertaining to, or attaching to their said real property. These rights include 1121.3/9ths shares of Old Channel Ditch Co. stock and 2856 shares of Young Ditch Co. stock. Second Parties warrant that 1269 acres of their said real property are included in the Pershing County Water Conservation District which are entitled to, per acre three and two-thirds acre feet of water per annum, if that amount of water is in the Rye Patch Reservoir. First Party shall have fifteen days from the opening date of said escrow to ascertain whether the figures in this paragraph are correct and if they are found to be correct, then this contract and the said escrow agreement are deemed to be valid and binding on all parties hereto. In the event these said figures are not correct, then First Party has the right to withdraw from this contract and the said escrow agreement with no liability on his part. Second Parties agree to transfer and convey all oil, gas, hydrocarbon and mineral rights, if any, owned by them, and the deed of conveyance shall so recite. All of said items of Second Parties are being considered on a basis of $203,000, including the amounts of indebtedness thereon.]

[The foregoing bracketed matter appeared

as an alteration on the original. (Stamped: Metropolitan Finance Corporation of Calif., /s/ E. S. Shipp. Initialed: H.O.M., C.C.P. and E.E.P.)]

The parties hereto shall supply policies of title insurance issued by reliable title companies for their respective properties described herein within sixty days from the date of opening of said escrow showing the titles to said properties to be merchantable and free from encumbrances except taxes and the encumbrances herein mentioned, and the hereinafter named agent is authorized to procure and deliver said evidences of title on behalf of all or any of the Parties hereto. Each party shall pay for the evidence of title to the property to be transferred and conveyed by them and the necessary U.S.I.R. stamps on deeds executed by them respectively. Each party hereto shall execute and deliver into said escrow all instruments in writing necessary to transfer and convey the titles to said properties and complete and consummate this exchange.

In the event errors appear in the titles to either or any of said properties, then this agreement shall be extended for a reasonable time, but not exceeding thirty days, that the same may be corrected. In the event any error cannot be corrected within said time this agreement shall be null and void, unless the title to the property affected is accepted subject thereto.

All taxes for the current fiscal year ending June 30th following this date on the California proper-

ties, and [16] the taxes for the year ending December 31st, 1952, on the Nevada property, and the insurance, rents and other expenses affecting said properties shall be prorated as of the date this exchange is completed and consummated, which shall be the closing date of said escrow. Any act required to be done may be extended not longer than thirty days by the hereinafter named agent.

First Party is making this offer to exchange real and personal property subject to the acceptance of same by Second Parties within ten (10) days from date hereof.

In the event this offer to exchange real and personal property is accepted by the Second Parties within ten (10) days from date hereof, all parties hereto agree to open, within fifteen days thereafter (if not rescinded as before provided), an escrow for the handling of this transaction with the Beverly Hills, California, branch of the California Bank, with appropriate instructions to the said escrow holder to proceed to complete and consummate this exchange in accordance with the terms and conditions set forth herein.

First Party is to have the use of the large Butane-equipped tractor and the large Carry-all, which pieces of equipment are now on the property of the Second Parties, at no charge, for the purpose of carrying on the land leveling and other work needed on the Nevada property, during the Calendar year of 1952. First Party agrees to turn over the said equipment at the end of the said year

in as good condition as it is on the closing date of said escrow.

Harley Moore, licensed real estate broker of Beverly Hills, California, and Reno, Nevada, is hereby authorized to act as agent for all parties hereto and may accept commission therefrom and should this offer be accepted by the Second Parties under the terms and conditions hereof, the undersigned agrees to pay said agent the sum of $2,500 commission for services rendered, said sum to become due and payable upon the closing of said escrow, and the said escrow instructions shall so recite. Should the above-named agent co-operate with another agent or other agents in this exchange, the undersigned agrees that the commission herein provided to be paid may be divided by them in any manner satisfactory to them.

Dated December 28, 1951.

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,

By /s/ E. S. SHIPP. [17]

Acceptance

The foregoing offer is hereby accepted upon the terms and conditions stated and the undersigned, hereinbefore called the Second Parties, agree to pay Harley Moore, licensed real estate broker of Beverly Hills, California, and Reno, Nevada, the sum of $7,500 commission for services rendered, said sum to become due and payable upon the closing of said escrow, and the said escrow instructions shall so recite. The undersigned further agree that should the above-named agent cooperate with another agent or other agents in this exchange, that the commission herein provided to be paid may be divided by said agents in any manner satisfactory to them.

Dated January 5, 1952.

/s/ CLIFTON C. PIERCE,

/s/ EILEEN E. PIERCE. [18]

EXCHANGE (Page One) ESCROW No. 56-8089-T

January 7, 19 52

ESCROW INSTRUCTIONS

To California Bank

Beverly Hills OFFICE

Beverly Hills, CALIF.

MEMO	Parcel 1	Parcel 2
Selling Price $	111,000.00	203,000.00
Unpaid Balance of Encumbrances of Record..	12,979.24	50,000.00
Equity Conveyed..	98,020.76	153,000.00
To Balance Equities)	From First Party	From Second Party
Cash	12,979.24	
Purchase Price Trust Deed on Parcel No II	42,000.00	

FOR THE PURPOSE OF EFFECTING AN EXCHANGE OF PROPERTIES HEREINAFTER DESCRIBED,

Metropolitan Finance Corporation of California

hereinafter designated as FIRST PARTY, hand you Grant deed executed by Metropolitan Finance Corporation of California to CLIFTON C. PIERCE and EILEEN E. PIERCE, husband and wife as joint tenants

and Clifton C. Pierce and Eileen E. Pierce, husband and wife hereinafter designated as SECOND PARTY hand you Grant deed executed by Clifton C. Pierce and Eileen E. Pierce, husband and wife to METROPOLITAN FINANCE CORPORATION of CALIFORNIA

The undersigned hereinafter designated, for the purposes of this Escrow, as Parcel II $12,979.24

The First PARTY will deposit in this escrow the sum of $ approximately/ for the credit and disposition of the Second PARTY upon the consummation of this exchange as hereinafter provided.

The First PARTY will deliver herewith for the benefit of the SECOND PARTY, Trust Deed (and note secured thereby) hereinafter referred to covering Parcel II

of Trust

Escrow Holder will also hand you any deeds, instruments and/or documents, including notes secured by encumbrances created by Second PARTY from him to enable you to comply with these instructions, all of which you are authorized and instructed to use and or deliver, provided on or before THIRTY DAYS from the above date January 7, 1952 you can hold for the account of the Second PARTY in this escrow, the sum of approximately/ $12,979.24 for which amounts have been held for record entitling you to procure assurances of title as follows:

AS TO PARCEL I

Policy of Title Insurance of Title Insurance and Trust Co with liability of $ amount to be given later on real property in the County of Los Angeles, State of California, described as Parcel I for the purposes of this escrow, as follows:

Legal description attached hereto and made a part hereof, by reference consisting of three parcels, plus certain personal property as hereinafter referred to.

as per map recorded in Book Page and records of said County,

SHOWING TITLE VESTED IN: CLIFTON C. PIERCE and EILEEN E. PIERCE, husband and wife as joint tenants

EXCEPTIONS TO BE: Second Installment General and Special Taxes for the fiscal year 19 51 - 19 52, including PERSONAL PROPERTY TAXES, if any, of any former owner AND ALSO INCLUDING ANY SPECIAL DISTRICT LEVIES, PAYMENT OF WHICH ARE INCLUDED THEREIN AND COLLECTED THEREWITH

All taxes and assessments levied or assessed subsequent to date of these instructions

Conditions, restrictions, reservations, easements, rights and rights of way, of record, if any

Mortgage Trust Deed securing an indebtedness of $ approximately $12,979.24, as per its terms, now of record, with which I am (we) hereby approve, no further approval necessary

TRUST DEED on CALIFORNIA TRUST COMPANY form executed by [redacted] to [redacted]

Securing Note for $ [redacted] in favor of [redacted]

dated [redacted] due [redacted] years after date, with interest at [redacted] per cent per annum, from [redacted] payable [redacted] at [redacted]

Principal and interest payable $ [redacted] or more, on the [redacted] day of each [redacted] month, beginning on the [redacted] day of [redacted] 19

California Bank is hereby instructed to endeavor to effect simultaneous or concurrent recording of the deeds to Parcels 1 and 2 in the respective county and state in which said properties are situated. Each party understands, however that through the inability and/or neglect of the Title Companies handling the searches of title to record concurrently as instructed, the deed covering one of the parcels may be recorded and the deed covering the other parcel may not be recorded. Each party releases and holds California Bank harmless on account thereof.

CB-1502 5M 5-50

Parcel 1: Lot 4 in Block 16 of Tract No. 7260, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in Book 78, Pages 64 and 65 of Maps, in the office of the County Recorder of said County.

Parcel II: Lots 13 and 14 in Block 4 of Tract 9377, in the City of Los Angeles, as per map recorded in Book 129, Pages 3 to 7 of Maps, in the office of the county recorder of said county.

Parcel III: That portion of Lot 12 in Block 4 of said Tract 9377, described as follows:

Beginning at the most easterly corner of Lot 14 in said Block 4; thence South 7° 49′ 48″ East 135.36 feet, more or less, to a point in the curved Southerly line of said Lot 12, distant Westerly thereon 25 feet from the Southeasterly corner thereof; thence Westerly along said Southerly line 75 feet to the Southwesterly corner of said Lot 12; thence North 14° 37′ 50″ West along the Westerly line of said Lot 12, for a distance of 110 feet to the most Westerly corner thereof; thence North 62° 57′ 30″ East along the Northerly line of said Lot 12, for a distance of 85 feet to the point of beginning.

AS TO PARCEL II

Policy of Title Insurance of Washoe Title Co. with liability of $ to be given later on real property in the County of Los Angeles, State of California, (designated as Parcel II for the purposes of this escrow) viz:

Legal description attached hereto and made a part hereof by reference consisting of one parcel plus certain personal property as hereinafter referred to.

as per map recorded in Book Page of records of said county.

SHOWING TITLE VESTED IN METROPOLITAN FINANCE CORPORATION OF CALIFORNIA

FREE OF ENCUMBRANCES EXCEPT: Second, Third and Fourth quarter of all General and Special Taxes for the fiscal year 19 51 , 19 , including PERSONAL PROPERTY TAXES if any, of any former owner AND ALSO INCLUDING ANY SPECIAL DISTRICT LEVIES, PAYMENT OF WHICH ARE INCLUDED THEREIN AND COLLECTED THEREWITH:

All taxes and assessments levied or assessed subsequent to date of these instructions

Conditions, restrictions, reservations, covenants, easements, rights and rights of way, of record, if any

Mortgage/Trust Deed securing an indebtedness of $ 50,000.00 as per its terms, now of record, with which I am familiar, and hereby approve, no further approval necessary

and TRUST DEED on CALIFORNIA TRUST COMPANY form executed by Metropolitan Finance Corporation of California

securing One note for $2,000.00 approximately in favor of Clifton C. Pierce and Eileen E. Pierce, husband and wife as joint tenants

dated during escrow, due date on principal payment dated years after date, with interest at 5% (five) per cent per annum, from payable at

Principal and interest payable $ or more on the day of each month, beginning on the 19 Payable as follows: $10,000.00 plus interest on or before November 1, 1952, and the balance of $32,000.00 plus interest on or before April 1, 1955.

Should the figure vary from $42,000.00 on the above described note, then adjustments will be made through this escrow to compensate for same.

AND ALSO, when you are held for the Second PARTY the following: A Bill of Sale covering certain personal property located on Parcel I hereof, a nine page inventory, copy of which is handed you herewith approved by both parties; no further approval necessary. Four leases covering the property known as 7216 to 7218½ Beverly Glen Boulevard, Los Angeles, and you are instructed to have said leases assigned to Clifton C. Pierce and Eileen E. Pierce, husband and wife as joint tenants. Said leases are hereby approved; no further approval necessary.

And also when you are held for the first party the following: A Bill of Sale covering certain personal property located on Parcel II hereof, a one page inventory of which is handed you herewith approved by both parties; no further approval necessary.

These escrow instructions are drawn pursuant to a certain Exchange agreement dated December 26, 1951, and executed by the parties hereto, a copy of which is handed you herewith, and shall not in any way be construed to alter, supersede, amend or change said agreement. However, California Bank, as Escrow, is not to be concerned with the terms, conditions, validity or performance of said agreement.

SECOND PARTIES agree to deliver, transfer and convey all water, water rights, ditches, ditch rights, ditch shares, range rights, pasture rights, and all rights of every kind and nature appurtenant to, appertaining to, or attaching to their said real property. These rights include 1121.3/9ths shares of Old Channel Ditch Co. stock and 2856 shares of Young Ditch Co. stock. SECOND PARTIES warrant that 1269 acres of their said real property are included in the Pershing County Water Conservation District which are entitled to, per acre, three and two/ thirds acre feet of water per annum, if that amount of water is in the Rye Patch Reservoir. FIRST PARTY shall have fifteen days from the opening date of said escrow to ascertain whether

Continued on page #4

That certain parcel of ranch real property consisting of 1,999.07 acres of land, more or less, together with and including all the improvements thereon, situated about two and one half miles North of the City of Lovelock, Nevada, and legally described as:

Township 27 North, Range 31 East, M.D.M.

Section 3: All.
Section 4: SE¼; Lots 1 and 2.
Section 10: Fractional part of the N½, and that portion of the SW¼ of said section lying North of the Old Channel Ditch.

Township 28 North, Range 31 East, M.D.M.

Section 26: E½ of E½.
Section 33: E½ of NE¼; SE¼.
Section 34: All.

ANY POLICY OF TITLE INSURANCE CALLED FOR UNDER THESE INSTRUCTIONS MAY BE ISSUED FOR THE BENEFIT OF ALL PARTIES IN INTEREST AND MAY BE PROCURED FROM ANY TITLE COMPANY OPERATING IN THE COUNTY WHERE THE PROPERTY IS LOCATED, AND WILL BE SUBJECT TO EXCEPTIONS AND CONDITIONS CONTAINED IN SUCH COMPANY'S REGULAR PRINTED FORM, INCLUDING BUT NOT LIMITED TO AN EXCEPTION THAT SAID POLICY WILL NOT INSURE AGAINST LOSS BY REASON OF THE RESERVATION OR EXCEPTION OF ANY WATER RIGHTS, CLAIMS, OR TITLE TO WATER.

FIRST PARTY authorizes you to charge him and, upon completion of this escrow, pay the following:

Commission of $ 2,500.00 to Harley Moore

Broker's License No. 90.75 whose address is

for U.S.I.R. Stamps, which are to be affixed to deed conveying Parcel I

Any encumbrances necessary to place title to Parcel I in the condition called for

SECOND PARTY authorizes you to charge him and, upon completion of this escrow, pay the following:

Commission of $ 7,500.00 to Harley Moore

Broker's License No. 137.50 whose address is

for U.S.I.R. Stamps, which are to be affixed to deed conveying Parcel II

Any encumbrances necessary to place title to Parcel II in the condition called for

The commission to be paid by the Second Party is to be evidenced by a 90 day note, executed by Clifton C. Pierce and Eileen E. Pierce in favor of Harley Moore, dated as of close of escrow and you are instructed to deliver said note to Harley Moore at close of escrow.

THE FOLLOWING ADJUSTMENTS ONLY ARE REQUIRED IN THIS ESCROW:

Unpaid principal balance of described Mortgage and/or Trust Deeds of record against either Parcel I or Parcel II, approximately $12,979.21 as of close of escrow

Beneficiary statements concerning amount of principal thereon to be $ 50,000.00 as to Parcel I, and adjust interest thereon to close of escrow

Beneficiary statements concerning amount of principal thereon to be $ as to Parcel II, and adjust interest thereon to close of escrow, and showing balance of principal thereon to be $, all such adjustments to be made on basis of such statements

Adjust interest on new Encumbrance as to Parcel I, by endorsement on notes

All taxes, including all items appearing on tax bills, except taxes on personal property including all personal property assessed against said property, as of close of escrow, based on latest available assessment and tax rate

Pro-rate rentals on Parcel I, Item I as of close of escrow, on basis of statements approved by both parties, but make no adjustment on uncollected rentals.

Parcel II consisting of premises known as 2216 to 2218½ South Beverly Glen Boulevard, Los Angeles, and 15,000 La Cumbre Drive, Pacific Palisades

Pierce Ranch, Lovelock, Nevada

and adjust as follows:

Parcel I transfer fee close of escrow

pro-rate premiums to

Parcel II transfer fee close of escrow

pro-rate premiums to

You may assume that the premiums on all policies have been paid in full and that said premiums have not been hypothecated

EACH PARTY agrees to pay on demand all charges and expenses incurred by you for him, regardless of the consummation of this escrow, including charges for title insurance, for sending in offset statements and beneficiaries' statements and/or demands, for special assessment district report, on property he conveys, for drawing and acknowledging documents he executes, for recording documents in his favor, and your escrow fee as charged.

FIRST PARTY authorizes you to mail by ordinary mail documents and checks in his favor to:

Metropolitan Finance Corporation of California

[redacted]

Upon receipt of the Bond Loan Recording to Party of the Second Part at close of escrow, you are instructed to pay to Peter A. Parnalder the sum of $12,500.00.

Continued from Page #2

the figures in this paragraph are correct and if they are found to be correct, then this contract and the said escrow agreement are deemed to be valid and binding on all parties hereto. In the event these said figures are not correct, then FIRST PARTY has the right to withdraw from this contract and the said escrow agreement with no liability on his part. SECOND PARTIES agree to transfer and convey all oil, gas, hydrocarbon and mineral rights, if any, owned by them, and the deed of conveyance shall so recite. All of said items of SECOND PARTIES are being considered on a basis of $30,000.00, including the amounts of indebtedness thereon.

In the event Party of the First Part shall see fit to withdraw, in accordance with the right given him in the foregoing paragraph, then Party of the First Part agrees there shall be no liability whatsoever on the Party of the Second Part. However, California Bank is not to be concerned with the obtaining or validity of said figures.

Party of the Second Part will hand you an assignment to Peter A. Fassakker of the first $10,000.00 payment on the Second Deed of Trust covering Parcel II, which assignment you are to have recorded concurrently with the other documents in this escrow, and said assignment is then to be delivered to Peter A. Fassakker.

Second party will also hand you a Note in the amount of $1,500.00 executed by Clifton D. Pierce and Hilda E. Pierce in favor of Peter A. Fassakker, which you are instructed to deliver to Fassakker at close of escrow.

Metropolitan Finance Corporation will hand you a Resolution of the Corporation to make this exchange of properties on the terms and conditions contained herein.

You are instructed to obtain and have assigned to the new owner all hereinbefore described ~~corporate~~ stock shares.

You are instructed to have the documents covering both parcels herein recorded as concurrently as is humanly possible.

You will, as my agent, assign any insurance of mine handed you for use in this escrow.

Make all adjustments and/or pro-ratings on the basis of a 30-day month and by credit and/or debit to my account in this escrow.

The expression "close of escrow" shall mean the date the instruments transferring the title to the properties described herein are recorded or registered.

EACH PARTY AGREES TO CLEAR THE PROPERTY WHICH HE CONVEYS OR CAUSES TO BE CONVEYED TO THE OTHER PARTY, BEFORE DELINQUENCY, OF THE LIEN OF ALL TAXES ASSESSED AGAINST ANY PROPERTY NOT INCLUDED HEREIN. YOU ARE NOT TO BE CONCERNED THEREWITH.

EACH PARTY GUARANTEES THAT THE PREMIUM ON ANY INSURANCE POLICY WHICH HE HANDS YOU OR CAUSES TO BE HANDED YOU HAS BEEN PAID AND THAT SAID POLICIES HAVE NOT BEEN HYPOTHECATED.

Deliver assurance of title and insurance policies, if any, to holder of first encumbrance, or order, if any. Make disbursements by your check. Documents and checks in my favor to be mailed to my address shown below, unless you are otherwise instructed.

If the conditions of this escrow have not been complied with at the time herein provided, you are nevertheless to complete the same as soon as the conditions (except as to time) have been complied with, unless I shall have made written demand upon you for the return of money and or instruments deposited by me.

NO NOTICE, DEMAND OR CHANGE OF INSTRUCTIONS SHALL BE OF ANY EFFECT IN THIS ESCROW UNLESS GIVEN IN WRITING BY ALL PARTIES AFFECTED THEREBY. In the event conflicting demands are made or notices served upon you with respect to this escrow, the parties hereto expressly agree that you shall have the absolute right at your election to do either or both of the following: withhold and stop all further proceedings in, and performance of, this escrow, or file a suit in interpleader and obtain an order from the court requiring the parties to interplead and litigate in such court their several claims and rights amongst themselves. In the event such interpleader suit is brought, you shall ipso facto be fully released and discharged from all obligations to further perform any and all duties or obligations imposed upon you in this escrow, and the parties jointly and severally agree to pay you all costs, expenses, and reasonable attorney's fees expended or incurred by you, the amount thereof to be fixed and a judgment thereof to be rendered by the court in such suit.

You are not to be held liable for the sufficiency or correctness as to form, manner of execution, or validity of any instrument deposited in this escrow, nor as to identity, authority, or rights of any person executing the same, nor for failure to comply with any of the provisions of any agreement, contract, or other instrument filed herein, and your duties hereunder shall be limited to the safekeeping of such money, instruments, or other documents received by you as escrow holder, and for the disposition of same in accordance with the written instructions accepted by you in this escrow.

All parties hereto further agree, jointly and severally, to pay on demand, as well as to indemnify and hold you harmless from and against all costs, damages, judgments, attorney's fees, expenses, obligations and liabilities of any kind or nature which, in good faith, you may incur or sustain in connection with, or arising out of this escrow, and you are hereby given a lien upon all the rights, titles and interest of each of the undersigned in all escrowed papers and other property and monies deposited in this escrow, to protect your rights and to indemnify and reimburse you under this agreement.

It is agreed by the parties hereto that so far as your rights and liabilities are concerned, this transaction is an escrow and not any other legal relation and you are an escrow holder only on the terms expressed herein, and you shall have no responsibility of notifying me or any of the parties to this escrow of any sale, resale, loan, exchange, or other transaction involving any property herein described or of any profit realized by any person, firm or corporation (broker, agent, and parties to this and/or any other escrow included) in connection therewith, regardless of the fact that each transaction(s) may be handled by you in this escrow or in another escrow.

These instructions may be executed in counterparts, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original, and said counterparts together shall constitute one and the same instrument.

Any amended, supplemental, or additional instructions given shall be subject to the foregoing conditions.

THE FOREGOING TERMS, CONDITIONS, PROVISIONS AND INSTRUCTIONS HAVE BEEN READ AND ARE UNDERSTOOD AND AGREED TO BY EACH OF THE UNDERSIGNED.

(Signature)	(Address)	(Zone)	(Telephone)
Clifton C. Pierce			
(Signature)	(Address)	(Zone)	(Telephone)
Hilda E. Pierce			
METROPOLITAN FINANCE CORPORATION OF CALIFORNIA			
(Signature)	(Address)	(Zone)	(Telephone)
By [illegible] Pres.			
(Signature)	(Address)	(Zone)	(Telephone)

Endorsed: Filed March 2, 1953.

[Title of District Court and Cause.]

ADDITIONAL STIPULATION OF FACT ON SUBMISSION OF CAUSE

It Is Hereby Stipulated by and between the parties hereto, by their respective attorneys:

(1) That Plaintiff is a corporation organized under the laws of the State of Delaware, and that Defendants are citizens of the State of California.

(2) That the matter in controversy is in the amount of $3,416.66.

(3) That on or about January 5, 1952, the Defendants, in writing, accepted an offer of the Plaintiff, dated December 28, 1951, for the sale and exchange of certain real and personal property. A copy of said offer and acceptance, lacking irrelevant exhibits, was filed with the Court as Exhibit A to a previous Stipulation of Fact filed on or about February 20, 1953, and by this reference thereto is made a part hereof.

(4) That on or about January 7, 1952, the parties hereto executed escrow instructions to the California Bank, Beverly Hills Office, Beverly Hills, California, for the purpose of consummating the said sale and exchange. A [23] copy of said escrow instructions was attached as Exhibit B to the said Stipulation of Fact filed on or about February 20, 1953, and by this reference thereto is made a part hereof.

(5) Said escrow was completed and closed, and

the documents transferring title of the various properties therein exchanged were recorded on April 9, 1952.

(6) 2,856 shares of Young Ditch Company, a corporation, were exchanged by the Defendants pursuant to the contract and transfer to the Plaintiff. That on or about the 27th day of March, 1952, at a special meeting of the Board of Directors of Young Ditch Company, a corporation, an assessment of $1 per share was levied on the outstanding capital stock of said corporation. Notice of assessment was thereafter sent to stockholders of said corporation under date of March 27, 1952, specifying that any stock upon which the assessment remained unpaid on May 15, 1952, would be delinquent and advertised for sale at public auction, and would be sold to pay any delinquent assessment together with any cost of advertising or expenses of sale.

That the assessment on the shares of Young Ditch Company stock, a corporation, transferred from the Defendants to the Plaintiff pursuant to the said agreement amounted to the sum of $2,856, being $1 per share for the said 2,856 shares.

(7) That also transferred from the Defendants to Plaintiff pursuant to the contract were 1,121 3/9 shares in Old Channel Ditch Company, a corporation.

(8) That on or about the 7th day of April, 1952, at a meeting of the Board of Directors of the Old Channel Ditch Company, a corporation, an assessment of fifty (50) cents per share was levied upon

the outstanding capital stock of the said corporation. Notice of assessment was thereafter sent to stockholders of said corporation under date of April 10, 1952, specifying that any stock upon which the assessment remained unpaid on May 15, 1952, would be delinquent and advertised for sale at public auction and would be sold to pay any delinquent assessment together with any costs of advertising or expenses of sale.

That the assessment on the shares of stock of the Old Channel Ditch Company, a corporation, transferred from the Defendants to the Plaintiff pursuant to the [24] agreement heretofore described amounted to the sum of $560.66, being fifty (50) cents per share for the 1,121 3/9 shares of said stock.

(9) That on or about the 14th day of April, 1952, Plaintiff in writing notified the Defendant Clifton C. Pierce of the assessment theretofore made by the Young Ditch Company in the sum of $2,856, and demanded of said Defendants that they remit to Plaintiff the sum of $2,856 in order that the said Plaintiff could pay said assessment theretofore levied by the said Young Ditch Company and release said stock of the lien placed upon it by reason of said assessment. That on or about the 16th day of April, 1952, Plaintiff, having received no reply to its demand upon the Defendants that they pay the said assessment of the Young Ditch Company in order not to have such stock sold at

public auction and thus lose said appurtenant stock, paid to the said Young Ditch Company the sum of $2,856 in payment of said assessment.

(10) That on or about the 29th day of April, 1952, Plaintiff in writing notified the said Clifton C. Pierce of the assessment theretofore made by the Old Channel Ditch Company in the sum of $560.66 and demanded of said Defendants that they remit to the Plaintiff the sum of $560.66 together with the sum of $2,856, being the assessment of the Young Ditch Company stock, in order that said Plaintiff might pay said assessments and release said stock of the lien placed upon the said stock by reason of said assessments. That on or about the 1st day of May, 1952, Plaintiff, having received no reply to its demand upon the Defendants that they pay the said assessments of the Old Channel Ditch Company, in order not to become delinquent in the payment of said stock and in order not to have such stock sold at public auction and thus lose said appurtenant stock, paid to the Old Channel Ditch Company the sum of $560.66 in payment of said assessment.

(11) That on or about the 12th day of June, 1952, and again on or about the 25th day of July, 1952, the Plaintiff in writing demanded of the said Defendants that they pay to the Plaintiff the sum of $3,416.66, being the total of the two assessments theretofore levied and paid by the said Plaintiff in order to free the stock transferred to the Plaintiff

from the Defendants pursuant to their written agreement of January 5, 1952. [25]

(12) That no part of the assessments heretofore described were paid by the Defendants but that the entire obligation has been paid by Plaintiff without reimbursement by Defendants.

(13) The funds obtained by Old Channel Ditch Company and Young Ditch Company as a result of the said assessments above referred to were used by said companies to pay for the removal of certain willow trees and debris, and otherwise to clean out ditches and water channels for the benefit of the Nevada property which was the subject of said escrow, and also for the benefit of the other properties to which stock in said ditch companies was also appurtenant; assessments for this purpose have been made by each of said companies at irregular intervals in the past, generally not less than three (3) years nor more than five (5) years apart, but, for the purposes of this litigation, it is stipulated that an assessment for this purpose shall be considered to be made every four (4) years.

(14) The foregoing Stipulation of Fact is for the purpose of agreeing as to the existence of the fact but does not admit the materiality or the weight to be given such fact, and each party reserves the right to file briefs pursuant to the further stipulation below:

It Is Further Stipulated by and between the parties hereto by and through their respective attorneys:

That the cause now pending before the Court may be submitted May 11, 1953, without further trial or hearing upon the Stipulation of Fact herein contained together with Exhibits "A" and "B" to the previous Stipulation of Fact filed April 20, 1953, both of said exhibits being incorporated herein.

It Is Further Stipulated that Plaintiff shall have a period of twenty (20) days in which to file an opening brief, the Defendants to have twenty (20) days in which to reply, and Plaintiff an additional ten (10) days for rebuttal. [26]

Dated: May 11, 1953.

/s/ MACFARLANE, SCHAEFER & HAUN,

By /s/ E. J. CALDECOTT,
Attorneys for Plaintiff.

JOSEPH D. FLAUM,

WALTER L. BRUINGTON and WALTER L. M. LORIMER,

By /s/ WALTER L. M. LORIMER,
Attorneys for Defendants.

It Is So Ordered. 5/13/53.

/s/ WM. M. BYRNE,
Judge.

[Endorsed]: Filed May 13, 1953. [27]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 9, 1953

Present: The Hon. Wm. M. Byrne,
District Judge.

Counsel for Plaintiff: No Appearance.

Counsel for Defendants: No appearance.

Proceedings:

Good cause appearing, the cause having heretofore on May 4, 1953, been submitted on filing of stipulation of facts and briefs,

It Is Ordered that judgment be for defendant, and that counsel for defendants prepare and submit findings and judgment in accordance with Local Rule 7.

Counsel notified.

EDMUND L. SMITH,
Clerk;

By EDW. F. DREW,
Deputy Clerk. [28]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on Monday, May 4, 1953, in the above-

entitled court, the Honorable William M. Byrne, Judge presiding; Macfarlane, Schaefer & Haun and E. J. Caldecott appearing as attorneys for plaintiff, and Joseph D. Flaum, Walter L. Bruington and Walter L. M. Lorimer appearing as attorneys for defendants Clifton C. Pierce and Eileen E. Pierce, and the case having been dismissed against John Doe, Jane Doe and Richard Roe Corporation, and the matter having been submitted for decision upon a stipulation of facts, and memoranda of law having been filed, and the court having considered the same and being fully advised, the court makes the following findings of fact: [29]

Findings of Fact

I.

Plaintiff is a corporation organized under the laws of the State of Delaware. Defendants are citizens of the State of California.

II.

The matter in controversy is in the amount of $3,416.66.

III.

On or about January 5, 1952, the Defendants, in writing, accepted an offer of Plaintiff, dated December 28, 1951, for the sale and exchange of certain real and personal property.

IV.

On or about January 7, 1952, the parties hereto executed escrow instructions to the California Bank, Beverly Hills Office, Beverly Hills, California, for

the purpose of consummating the said sale and exchange.

V.

Said escrow was completed and closed, and the documents transferring title of the various properties therein exchanged were recorded on April 9, 1952.

VI.

2,856 shares of Young Ditch Company, a corporation, were exchanged by Defendants pursuant to the contract and transferred to Plaintiff.

VII.

On or about March 27, 1952, at a special meeting of the Board of Directors of Young Ditch Company, a corporation, an assessment of $1.00 per share was levied on the outstanding capital stock of said corporation. Notice of Assessment was thereafter sent to stockholders of said corporation under date of March 27, 1952, specifying that any stock upon which the assessment remained unpaid on May 15, 1952, would be delinquent and [30] advertised for sale at public auction, and would be sold to pay any delinquent assessment together with any cost of advertising or expenses of sale.

VIII.

The assessment on the shares of Young Ditch Company stock so transferred was $2856.00.

IX.

Defendants also transferred to Plaintiff pursuant

to said contract 1121 3/9 shares in Old Channel Ditch Company, a corporation.

X.

On or about April 7, 1952, at a meeting of the Board of Directors of Old Channel Ditch Company, an assessment of fifty cents per share was levied upon the outstanding capital stock of the said corporation. Notice of assessment was thereafter sent to stockholders of said corporation under date of April 10, 1952, specifying that any stock upon which the assessment remained unpaid on May 15, 1952, would be delinquent and advertised for sale at public auction and would be sold to pay any delinquent assessment together with any costs of advertising or expenses of sale.

XI.

The assessment on the shares of stock of Old Channel Ditch Company which Defendants transferred to Plaintiff pursuant to the said contract was $560.66.

XII.

On April 14, 1952, plaintiff notified defendant Clifton C. Pierce in writing of the assessment theretofore made by the Young Ditch Company and demanded that defendants remit to plaintiff $2856.00, in order that plaintiff could pay the said assessment, and release said stock of any lien placed upon it by reason of said assessment. On April 16, 1952, in order to prevent sale of the stock at public auction, plaintiff paid to Young Ditch [31] Com-

pany the amount of said assessment, not having theretofore received any reply to its demand from defendants.

XIII.

On April 29, 1952, Plaintiff notified Defendant Clifton C. Pierce in writing of the assessment theretofore made by the Old Channel Ditch Company, and demanded of Defendants that they remit to Plaintiff the amount of said assessment, as well as the amount of the Young Ditch Company assessment, in order that Plaintiff might pay said assessments and release said stock from any lien placed upon it by reason of said assessments. On May 1, 1952, in order to prevent sale of the stock at public auction, Plaintiff paid to Old Channel Ditch Company the amount of its assessment, not having theretofore received any reply to its demand of April 29, 1952, from Defendants.

XIV.

On June 12, 1952, and on July 25, 1952, Plaintiff demanded of Defendants, in writing, that they pay Plaintiff the sum of $3416.66, being the total of the two said assessments which had theretofore been paid by Plaintiff.

XV.

No part of the assessments heretofore described was paid by Defendants, and the entire amount of said assessments was paid by Plaintiff, without reimbursement by Defendants.

XVI.

The funds obtained by Old Channel Ditch Com-

pany and Young Ditch Company as a result of the said assessments above referred to were used by said companies to pay for the removal of certain willow trees and debris, and otherwise to clean out ditches and water channels for the benefit of the Nevada property which was the subject of said escrow, and also for the benefit of the other properties to which stock in said ditch companies was also appurtenant. Assessments for this purpose have been made by each [32] of said companies at irregular intervals in the past, generally not less than three years nor more than five years apart. The parties have stipulated that for the purpose of this litgitation, an assessment for this purpose shall be considered to be made every four years.

Conclusions of Law

From the foregoing facts, the court makes the following conclusions of law:

I.

At the time Plaintiff paid said assessments, and at all times thereafter, Defendants were under no duty or obligation to pay said assessments, nor any part thereof.

Dated: December 23, 1953.

/s/ WM. M. BYRNE,
Judge.

Affidavit of Service by Mail attached.

Lodged December 15, 1953.

[Endorsed]: Filed December 23, 1953. [33]

In the District Court of the United States for the Southern District of California, Central Division

No. 14,612-WB

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA, a Corporation,

Plaintiff,

vs.

CLIFTON C. PIERCE, EILEEN E. PIERCE, JOHN DOE, JANE DOE and RICHARD ROE CORPORATION, a Corporation,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for hearing on Monday, May 4, 1953, in the above-entitled court, the Honorable William M. Byrne, Judge presiding; Macfarlane, Schaefer & Haun and E. J. Caldecott appearing as attorneys for plaintiff, and Joseph D. Flaum, Walter L. Bruington and Walter L. M. Lorimer appearing as attorneys for defendants Clifton C. Pierce and Eileen E. Pierce, and the case having been dismissed against John Doe, Jane Doe and Richard Roe Corporation, and the matter having been submitted for decision upon a stipulation of facts, and memoranda of law having been filed, and the court having considered the same and being fully advised, and the court having

heretofore made and caused to be filed its written findings of fact and conclusions of law, [35]

It Is Ordered, Adjudged and Decreed that plaintiff take nothing by reason of its complaint.

Dated: December 23, 1953.

/s/ WM. M. BYRNE,
Judge.

Affidavit of Service by Mail attached.

Lodged December 15, 1953.

[Endorsed]: Filed December 23, 1953.

Docketed and entered December 23, 1953. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Clifton C. Pierce, Eileen E. Pierce and to Joseph D. Flaum, Walter L. Bruington and Walter L. M. Lorimer, Their Attorneys:

Notice Is Hereby Given that the Metropolitan Finance Corporation of California, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on December 23, 1953.

Dated this 18th day of January, 1954.

MACFARLANE, SCHAEFER
& HAUN,

By /s/ E. J. CALDECOTT,
Attorneys for Plaintiff-
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1954. [38]

[Title of District Court and Cause.]

POINTS ON WHICH THE APPELLANT INTENDS TO RELY ON APPEAL

Pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, appellant states the points on which it intends to rely in the appeal in this action are as follows:

I.

The Court erred in granting judgment for the defendants in this action.

II.

The Court erred in concluding that the plaintiff paid the assessments in this action but that defendants were under no duty or obligation to pay said assessments or any part thereof.

III.

The Court erred in not concluding that the assess-

ments which were levied during the period of escrow were to be paid by the [40] defendants.

Dated this 18th day of January, 1954.

MACFARLANE, SCHAEFER & HAUN,

By /s/ E. J. CALDECOTT,
Attorneys for Plaintiff-Appellant.

[Endorsed]: Filed January 21, 1954. [41]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 45, inclusive, contain the original Complaint; Answer; Stipulation of Fact, Additional Stipulation of Fact; Minutes of the Court for December 9, 1953; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points on Appeal and Designation of Record on Appeal, which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2d day of February, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14,222. United States Court of Appeals for the Ninth Circuit. Metropolitan Finance Corporation of California, Appellant, vs. Clifton C. Pierce and Eileen E. Pierce, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 3, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14222.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,
Appellant,

vs.

CLIFTON C. PIERCE and EILEEN E. PIERCE,
Appellees.

APPELLANT'S OPENING BRIEF.

MACFARLANE, SCHAEFER & HAUN,
By E. J. CALDECOTT,
417 South Hill Street,
Los Angeles 13, California,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 14222.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,
Appellant,

vs.

CLIFTON C. PIERCE and EILEEN E. PIERCE,
Appellees.

APPELLANT'S OPENING BRIEF.

I.

BASIS OF JURISDICTION.

This action was commenced in the United States District Court for the Southern District of California, Central Division, upon the ground that there was diversity of citizenship between the plaintiff, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and a citizen of that state, and the defendants, who were citizens of the State of California, and the fact that the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000.00, to-wit: $3,416.66.

This is a direct appeal from a judgment entered against the plaintiff by said District Court, and this Honorable Court of Appeals therefore has jurisdiction to entertain and hear the within appeal.

II.
STATEMENT OF THE CASE.

This cause, at issue by reason of the complaint filed October 16, 1952, and the answer of the defendants filed December 15, 1952, was determined in the lower court solely upon stipulated facts, the stipulation being thus contained at pages 15 to 40 of the Transcript of Record. Basically the stipulation was as follows:

The plaintiff is a citizen of Delaware, and the defendants are citizens of California, and the amount in controversy is $3,416.66. That on December 28, 1951, the plaintiff executed a document entitled Sale and Exchange of Real and Personal Property, this document being in the nature of an offer, which was accepted by the defendants on January 5, 1952, and except for certain irrelevant exhibits this document was set forth as Exhibit "A" to the stipulation [Tr. of Rec., 17-26].

Following the execution of the foregoing document, hereinafter to be referred to as the Exchange Agreement, the parties entered into escrow instructions with the California Bank, Beverly Hills, California, for the purpose of consummating the transactions set forth in the Exchange Agreement. The escrow instructions were set forth as Exhibit "B" to the stipulation [Tr. of Rec. 27-33]. Exhibit "B" will be hereinafter referred to as Escrow Instructions.

The escrow was completed and closed, and the documents transferring title to the various properties covered

by the agreements were recorded on April 9, 1952. Among the properties encompassed in the agreement were 1121.3/9ths shares of Old Channel Ditch Co. stock and 2856 shares of Young Ditch Co. stock, which stock the parties by their contract agreed was appurtenant to the real property exchanged [Tr. of Rec. 22].

During the period of the escrow, and prior to its close, and on or about the 27th day of March, 1952, the Young Ditch Co. Board of Directors levied an assessment of $1.00 per share on the outstanding capital stock of the corporation, and on the same date notice of assessment was sent to stockholders, which notice specified a delinquency date of May 15, 1952, after which any stock on which the assessment remained unpaid would be advertised for sale at public auction, and would be sold to pay any delinquent assessments, together with costs of advertising and expenses of sale. During the same interim, and on or about April 7, 1952, the Old Channel Ditch Co. Board of Directors levied an assessment of 50 cents per share on the outstanding capital stock. Notice of this assessment was sent to stockholders under date of April 10, 1952, but specified identical terms to that of the Young Ditch Co. in regard to delinquency after May 15, and public sale. The assessments levied by the companies respectively were in the sums of $2,856.00 for the Young Ditch Company and $560.66 for the Old Channel Ditch Company.

On or about April 14, 1952, the plaintiff gave written notice to the defendant, Clifton C. Pierce, of the assess-

ment of the Young Ditch Company, and on or about the 16th of April, having received no reply to its demand to the defendants to pay the assessment, the plaintiff, in order not to have such stock sold at public auction, and thus lose the appurtenant stock, paid the Young Ditch Company the sum of $2,856.00, as specified in the assessment.

Subsequently, and on or about April 29, plaintiff notified in writing the defendant, Clifton C. Pierce, of the assessment theretofore made by the Old Channel Ditch Company and demanded payment of this assessment as well as that it had previously paid on the Young Ditch Company stock assessment. Having had no reply, on or about the 1st of May, 1952, the plaintiff paid the Old Channel Ditch Company in order not to be delinquent in the payment of said stock assessment, and in order not to lose said appurtenant stock through the nonpayment of the assessment. Twice again, on June 12, and July 25, both in the year 1952, the plaintiff demanded of the defendants that they pay to the plaintiff the separate amounts totalling $3,416.66, as set forth in the two assessments, and which had been therefore paid by the plaintiff in order to free the stock from the liens created by the assessments.

The defendants throughout refused to pay any part of the assessments, and have paid no part thereof, and the total assessments are the sum sought to be recovered by this action.

The stipulation also contained a paragraph as to the purpose of the assessments, which was agreed to be the removal of certain willow trees and debris, and other-

wise clean out the ditch and water channels for the benefit of the property received by the plaintiff. It was further agreed that assessments for this purpose had been levied in the past at irregular intervals varying from three to five years, but agreed for the purpose of this litigation to be made every four years, and it was further agreed that the stipulation of fact was only as to fact and was not an admission of the materiality of any fact or the weight to be given any fact [Tr. of Rec. 39].

Following the submission of the stipulated facts, the court took the matter under advisement, and on December 9, 1953, in its minutes ordered judgment for the defendants [Tr. of Rec. 41] and Findings of Fact and Conclusions of Law were submitted, dated and filed December 23, 1953. Judgment was entered accordingly on the same date [Tr. of Rec. 41-48]. The judgment is no more than recitation that the plaintiff take nothing by reason of its complaint. The Conclusion of Law based upon the stipulated fact is singular, and states as follows:

> "At the time plaintiff paid said assessments, and at all times thereafter, defendants were under no duty or obligation to pay said assessments, nor any part thereof" [Tr. of Rec. 46].

From the judgment so entered, the plaintiff has appealed.

III.

SPECIFICATION OF ERRORS.

1. The court erred in concluding that the defendants were under no obligation to pay the assessments levied on the appurtenant water stock prior to the close of escrow.

IV.

ARGUMENT.

1. The Questions Presented by This Appeal Are Solely of Law and Not of Fact.

Although of necessity, facts will have to be referred to to determine the applicable law, and interpretation thereof, there are no questions of fact presented, as the statement previously rendered clearly shows that the stipulation of the parties covered all the facts. The facts presented by the stipulation in reality amount to little more than the statement that the parties had entered into a contract for the exchange of real property, together with the appurtenant water stock, which contract was carried into effect through the use of escrow instructions, and an escrow was opened and closed to handle the transaction. The question truly is one of the interpretation of the agreement. As the controversy was submitted upon an agreed state of facts, the only question before this court on appeal is "whether the judgment clearly defines the effect of the stated facts as a matter of law."

> *1165 5th Avenue Corporation v. Alger,* 288 N. Y. 67, 41 N. E. 2d 461, 141 A. L. R. 1157, citing and quoting from *First v. 5th Avenue Bank of New York,* 280 N. Y. 189, 190, 20 N. E. 2d 388, 389.

2. Title to the Properties, Including the Stock, Passed at the Close of Escrow.

The agreement of the parties, as set forth in the Exchange Agreement, very specifically stated that the exchange was to be completed and consummated at the closing date of the escrow [Tr. of Rec. 24]. The parties by their act of stating that the closing date of escrow would

be the date at which the exchange would be completed and consummated, have terminated the right of the courts, or anyone, to state that title passed at any different time. The escrow was closed on April 9, 1952 [Finding of Fact V, Tr. of Rec. 43], and it is this latter date which is the controlling date for the completion of the agreement.

It has been said that title obtained through an escrow relates back to the opening of the escrow, and that equitable title passes as of the date the escrow is opened. This doctrine is applicable only in the event the parties have not contracted to the contrary. In this instance, the parties have contracted to the contrary, but even assuming that the parties had not specifically stated that the Exchange Agreement would be completed as of the close of escrow, the so-called doctrine of "relation back" is not applicable under the current facts. This doctrine will be applied only where it is necessary to give "effect to the instrument, to prevent injustice, or to effectuate the intention of the parties. In other words, its application depends on its consequence in the particular case. It will be applied where, and only where, it will produce a result required by equity and justice" (117 A. L. R. 74).

The annotation cited above quotes from *McMurtrey v. Bridges* (1913), 41 Okla. 264, 137 Pac. 721, in its note at page 89, which clearly shows that the grantee may recover taxes which became due and were a lien upon the land at the close of escrow.

Likewise, it has been held that the grantor in possession was liable for the taxes accruing during the term of the escrow and prior to final delivery of the deed.

Mohr v. Joslin (1913), 162 Iowa 34, 132 N. W. 981.

In the same vein, the text matters have dealt with the subject of taxes during the term of the escrow.

See 19 Am. Jur., Escrows, Sec. 30, page 452.

It is logical and proper to, by analogy to the cases relating to taxes, state that assessments either private or public, levied during the term of the escrow, are the responsibility of the owner of the stock, in this case clearly the liability of the defendants.

3. Title to the Stock Not Having Passed Until the Close of Escrow the Assessment Was a Lien Against the Property at the Close of Escrow.

The laws of the State of Nevada, the home of both of the ditch companies, provide for assessments on paid up stock. (Nevada Compiled Laws, Sec. 1603, (6).) No section of the Nevada laws states the manner of assessment, except Section 1673 of the Nevada Compiled Laws which relates to the assessment on dissolution by the Directors as Trustees, and this section provides for personal liability and sets forth proposals which appellant believes are proper, any time there is need for funds by assessment, whether under Section 1673 or 1603(6).

The assessment having been made in each instance by the Board of Directors, became at the time of the assessment a lien on the individual shares of stock in the hands of the owner, and were a charge against the stock, and hence against the land at the time of transfer. Had the plaintiff not undertaken to pay off the assessment and released the lien by May 15, then the property could be, and would be, sold by the respective companies.

In connection with the liens against the property, the parties again specifically contracted as to the extent of

such liens [Tr. of Rec. 21-22]. It was not contemplated that the plaintiff would in addition assume the liability of $3,000.00 for the assessment on the water stock, which assessment was levied during the period of the escrow.

It was expressly provided also that the contract between the parties, as set forth in the Exchange Agreement, was to be the controlling document, and that nothing in the escrow instructions were to alter this contract. At page 2 of the escrow instruction, in the next to the last paragraph, it is provided as follows:

> "These escrow instructions are drawn pursuant to a certain Exchange Agreement dated December 28, 1951, and executed by the parties hereto, a copy of which is handed you herewith, and shall not in any way be construed to alter, supersede, cancel or change said agreement. However, California Bank, as escrowee is not to be concerned with the terms, conditions, validity or performance of said agreement" [Tr. of Rec. 30].

In addition to having contracted the amount of lien, the parties provided in their agreement that "insurance, rents and *other expenses affecting said properties* shall be prorated as of the date this exchange is completed and consummated, which shall be the closing date of said escrow" [Tr. of Rec. 24]. (Emphasis added.)

The question may then be asked as to whether or not assessments of the nature herein set forth are pro-ratable. The term "pro-rate" has been defined as follows:

> 1. " 'Prorate': To divide or distribute proportionately; to assess prorata.
>
> " 'Prorata': Proportionately; according to share, interest or liability of each."
>
> *Webster's New International Dictionary,* 1951 Edition.

2. "'Prorata': The term is generally understood to denote a disposition of a fund or sum indicated in proportion to some rate or standard, fixed in the mind of the person speaking or writing, manifested by the words spoken or written, according to which rate or standard the allowance is to be made or calculated. The fund of which distribution is thus to be made must be indicated by the words spoken or written by the speaker or writer."

Law Dictionary with Pronunciations by James A. Ballentine (1930).

"'Prorate': A verb derived from the term 'prorata' and meaning to divide or distribute proportionately; to assess prorata."

Law Dictionary with Pronunciations by James A. Ballentine (1930).

3. *Rosenberg v. Frank,* 58 Cal. 387, 406:

". . . It is well understood by persons of ordinary intelligence to denote a disposition of a fund or sum indicated in proportion to some rate or standard, fixed in the mind of the person speaking or writing, manifested by the words spoken or written, according to which rate or standard the allowance is to be made or calculated. The fund of which distribution is thus to be made must be indicated by the words spoken or written by the speaker or writer."

4. *Hendrie v. Lowmaster,* 152 F. 2d 83, 85:

"The only appearance of ambiguity in the original order of the court arises from the words 'pro rata distribution among its shareholders.' '"Pro rata" means according to a measure which fixes proportions. It has no meaning unless referable to some rule or standard.' Chaplin v. Griffin, 252 Pa. 271, 97 A. 409, Ann. Cas. 1918C 787; Brombacher, *et al.* v. Berking, *et al.,* 56 N. J. Eq. 251, 39 A. 134."

From the foregoing definitions of the term "prorate" it is clear that the proration may be 50-50, 75-25, 90-10, 99-1 or even 100-0. In the instant case, it is clear that this proration must be 100-0, and that the 100 must fall upon the defendants for the reason that there is no fixed standard by which to prorate the assessment.

The Board of Directors with power to levy assessments at any time the funds are needed may do so within a week of a prior assessment, or several years later.

The fact that an average period for the purposes of the present assessment was agreed to, is of no concern to the parties, nor is in fact the purpose of the assessment. It does not matter that the clearing of the ditch will benefit the properties in the future, for it is just as logical to assume that the assessment is levied for the purpose of clearing the mess created by the past use not for the benefit of future use. Therefore, the four years set forth in the stipulation is immaterial and is not a term over which there could be any proration of the assessments, except on the basis of 100% and zero.

The clause from the contract above quoted [Tr. of Rec. 24] clearly shows that it is to cover all "expenses affecting said properties." There can be no question but that the assessment liens affected the properties, for the lien having attached when levied by the Board of Directors, the payment of it was an expense affecting the properties. In this connection, the term "expense" was defined in part as follows: "That which is expended, outlay, hence the burden of expenditure, as the expense of war."

Webster's Collegiate Dictionary, 1947.

There can be no question therefore but that the payment by the plaintiff of the assessments was an expense

which affected the properties. As such, pursuant to the agreement, it was a charge for the defendants to have paid, not the plaintiff.

4. Summation.

The burden of paying the assessments levied on the appellant's water stock was the burden of the person who was the owner of the stock on the date the assessment was levied. From the foregoing, it is clear that title did not pass until April 9, 1952, and that the assessments were a lien March 27 and April 7 respectively, and were expenses affecting the property prior to the close of escrow. As such the obligation for the payment of each of the assessments rested upon the defendants, and the trial court erred in concluding otherwise.

CONCLUSION.

It is respectfully submitted that the court below erred in its conclusion and in the entering of a judgment based thereon in favor of the appellees, by misapplying the law to the stipulated state of facts; therefore it is respectfully requested that the decision of the District Court be reversed.

Respectfully submitted,

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No. 14222.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,
Appellant,

vs.

CLIFTON C. PIERCE and EILEEN E. PIERCE,
Appellees.

APPELLEES' BRIEF.

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Appellees.

APPELLEES' BRIEF.

I.
STATEMENT OF FACTS.

The facts of the case are accurately set forth in Appellant's Opening Brief, with one possible exception. It is suggested at the top of page 5 that some question may remain as to the materiality or admissibility of evidence concerning removal of certain trees and debris from the ditches and water channels. It was stipulated as a fact that this work was done approximately every four years, for the benefit of the Nevada property [Tr. p. 39], and the trial court expressly so found [Tr. p. 46]. Since Appellant has not specified the finding as error, the evidence must be considered to be before the court on this appeal.

II.

ARGUMENT.

1. The Contract Does Not Specify Who Should Pay the Assessments.

(a) No Clause of the Contract Expressly States Who Should Pay Such Assessments; and the Assessments, Not Being Proratable, Do Not Fall Into the Proratable "Other Expense" Category.

The entire contract between the parties consisted of two documents, namely, the Exchange Agreement and the Escrow Instructions. The latter by its terms was not to alter, supersede, cancel, or change the former [Tr. p. 30]. To determine who was liable to pay the assessments, the contract must first be examined, for regardless of what the law may provide as to who pays, absent a specific contractual provision, the parties were free to specify which of them should pay.

But the contract is silent on the subject. The Exchange Agreement *docs* provide that the following items shall be prorated: (a) Taxes; (b) Insurance; (c) Rents, and (d) "Other expenses affecting said properties" [Tr. pp. 23-24]. This language is given effect in the Escrow Instructions, where the bank is instructed to adjust interest on encumbrances, prorate taxes, prorate rentals, and prorate insurance premiums [Tr. p. 32].

Not a word about assessments. Appellant argues that assessments must be included in the phrase "other expenses affecting said properties" (App. Br. p. 11), which the Exchange Agreement provides "shall be prorated." Nevertheless, Appellant devotes one-fourth of its argument to the proposition that such assessments can *not* be

prorated (App. Br. pp. 9-10). Since the parties did not specify a base for proration of assessments, it would appear that they could not have intended to include assessments within the proratable class of "other expenses."

(b) The Contract Does Not Contain a Ceiling on the Sum Appellant Should Be Required to Pay for Assessments, Taxes, or Expenses.

Appellant suggests that the parties specifically contracted as to the extent of liens outstanding (App. Br. pp. 8-9), referring to pages 21 and 22 of the Transcript of Record, where it is stated that certain listed encumbrances exist on the Nevada property, and "All of said items of Second Parties are being considered on a basis of $203,000.00, including the amounts of indebtedness thereon." Appellant states (App. Br. p. 9):

> "It was not contemplated that the plaintiff would in addition assume the liability of $3,000.00 for the assessment on the water stock, which assessment was levied during the period of the escrow."

The referenced pages simply do not support the contention. The parties had it clearly in mind that Appellant would assume liability for items other than the listed encumbrances, and provided in the Exchange Agreement for the payment by Appellant of taxes and insurance which did not form a part of the $203,000.00 figure.

Furthermore, the value of $203,000.00 was fixed with knowledge on the part of both parties that assessments on the ditch stock were imminent, since they came at more or less regular intervals. The amount of the assessments must have been taken into consideration in determining the value of the ditch stock. As the likelihood of a prompt dividend invariably inflates the value of a

common stock, the probability of a prompt assessment can only have a contrary effect. It would be manifestly unjust that Appellant should receive the ditch stock at a reduced price because of a pending assessment, but nevertheless require Appellees to pay that very assessment.

(c) The Contract Contains No Provision Against Encumbrances Arising After the Escrow Was Opened.

The parties contemplated that the state of title would be guaranteed by a title company, and therefore neither the Exchange Agreement nor the Escrow Instructions contain any agreement on the part of any of the parties that the property transferred should be free of encumbrances at the close of escrow. The Exchange Agreement *docs* provide, however, that the parties should provide policies of title insurance on their respective properties showing titles to be merchantable and free from encumbrances, except taxes and encumbrances mentioned in the agreement. These were to be furnished within 60 days from opening of escrow [Tr. p. 23]. Policies of title insurance, and nothing more, since under the circumstances no further warranty of title was necessary, the title company having the full responsibility in the event of a defective title.

(d) Any Ambiguity or Uncertainty Must Be Resolved Against Appellant.

The entire dispute now pending could have been avoided had the contract expressly provided which of the parties should pay assessments levied after the opening of the escrow. Appellees submit that the contract makes no provision whatsoever in that regard, and that the burden of paying the assessments therefore falls upon the person

owning the stock when the payment became due. If the contract can be construed to provide otherwise, it is only by a twisted construction of it, and an ambiguous contract is always construed most strongly against the draftsman, in this case the offerer, the Appellant.

Civil Code, Sec. 1654;

Wilck v. Herbert, 78 Cal. App. 2d 392, 411.

2. Even if Assessments Might Have Been Included in the "Other Expenses" Clause, Liability for Payment of the Assessments Involved Here Would Fall Upon Appellant.

(a) The Assessments Would Have to Be Prorated, and the Entire Base Period Followed Close of Escrow.

If the parties *did* intend to include assessments within the term, they must have intended that the burden of payment should lie upon the person who received the benefit. Hence, the proration clause. Since taxes are levied for a fixed fiscal period, and insurance is sold for a fixed term of years, it was unnecessary to state the standard or base to be used for their proration. The very fact the standard or base was omitted is probably conclusive that the parties did not intend to include assessments in the term "other expenses." Still, if they did, the failure to define the base for proration was merely a failure to define something readily determinable from examination of past practices, and clearly defined for the purposes of this suit by the stipulation of the parties. The base period is four years [Tr. p. 39]. Apportionments and prorations are made daily by accountants on the basis of the usual and expectable, and the entire system of tax deductions for depreciation is based upon such apportionments, so the four-year base period reached by stipulation merely

fixes the period which must have been reached as the base period after an examination of the facts.

Both the Findings of Fact [Tr. p. 46] and the stipulation of the parties [Tr. p. 39] are clear on one point—the removal of trees and debris, and clearing of the channels and ditches were for the *benefit* of the Nevada property. A benefit can only act prospectively, not retroactively. The Nevada property did not receive any benefit for the years 1948 to 1952 through work performed in 1952. The benefit is for the years 1952 through 1956, and if there is to be a proration, it must be on a prospective basis. Since payment was not required until May 15, 1952, one month and six days after the escrow had closed, none of the base period for proration fell within the period of defendant's ownership regardless of whether title passed at close of escrow, or upon execution of the Exchange Agreement.

(b) The Assessments Did Not Become "Expenses" Until After Close of Escrow.

Thus, even if the assessments were to be included in the term "other expenses," they became such only *after* the close of escrow, when they were paid. As Appellant has pointed out on page 11 of the Opening Brief, an expense is that which is expended or outlaid. The word is defined at length in Corpus Juris Secundum, volume 35, page 207, *et seq.*, but the various meanings all involve a disbursement. The word is *not* synonymous with "indebtedness." The expenditures, or disbursements, were made after close of escrow, and must fall upon the person holding title to the property at that time. The proration clause was clearly intended to apply to actual disbursements during the escrow period.

3. Under California Law, in the Absence of a Contrary Contractual Provision the Purchaser Must Pay Assessments Levied After Escrow Is Opened.

The contract being silent on the question of who shall pay assessments, the matter must then be governed by the established law of California, which provides that in an escrowed transaction, upon performance by the parties of the terms of the escrow, title passes as of the date the escrow was opened.

McDonald v. Huff, 77 Cal. 279, 283, 19 Pac. 499;

Miller & Lux v. Sparkman, 128 Cal. App. 449, 17 P. 2d 772;

Marr v. Rhodes, 131 Cal. 267, 270, 63 Pac. 364;

Hawi Mill v. Finn, 82 Cal. App. 255, 261, 255 Pac. 543.

As of the date escrow was opened, the assessments had not been levied, and it follows that Appellees could not have been held liable for payment of the assessments in the absence of an agreement to pay them. Unless Appellees are to be held liable for all assessments ever levied on the ditch stock from the date of opening escrow to the infinite future, no reason appears why they should be required to pay the ones involved here, where payment was not required by the terms of the levy until more than four months after title to the property had passed, and more than a month after escrow had closed.

On page 7 of its brief, Appellant cites cases from other jurisdictions for the proposition that the doctrine of "relation back" applies only in cases where it is necessary to give "effect to the instrument, to prevent injustice, or to effectuate the intention of the parties." Although this narrow proposition does not appear to be the law of

California, if the parties had *any* intention that Appellees might in any event become liable to pay any assessments, it was expressed in the "other expenses" clause [Tr. p. 24], which provides for proration of the charge. It would both defeat the intention of the parties and be the rankest of injustices to require Appellees to pay the assessment, yet permit Appellant to reap the full benefit of the work done.

Neither of the cases cited by Appellant in opposition to the doctrine of relation back are applicable here. *Mohr v. Joslin,* 162 Iowa 34, 132 N. W. 981 (1913) (App. Br. p. 7), was decided under a section of the Iowa code which established who was liable for taxes as between vendor and purchaser, and since the contract involved had no contrary provision, it was held to be the defendant's duty to discharge the tax involved. In *McMurtrey v. Bridges,* 41 Okla. 264, 137 Pac. 721 (1913), the contract expressly provided for the defendant's payment of taxes due "at time of delivery," which phrase was construed to mean "close of escrow." Hence, even if title had related back, the defendant would have been obliged to pay the tax.

On the other hand, in *Commissioner of Internal Revenue v. Moir* (C. C. A. 7, 1930), 45 F. 2d 356, the court looked at the realities of the situation, and concluded that where the defendant had the power to obtain title by simply paying the purchase price into escrow, he had title for all practical purposes, and was taxed as though he held title from the date escrow was opened.

In *Deming v. Smith,* 19 Cal. App. 2d 683, 687, the California court said the doctrine of relation back applied when the grantee could obtain title by the mere performance of his obligations under the purchase agreement,

namely, payment of the purchase price. That is the precise situation involved here, and it is submitted that the California cases must govern the decision of this court.

4. Neither Personal Liability to Pay the Assessments nor a Lien or Charge Against the Stock Was Created by the Levy of Assessments.

If it is Appellant's contention that Section 1673 of the Nevada compiled laws is comparable to the Iowa code section which governed the decision in *Mohr v. Joslin* (1913), 162 Iowa 34, 132 N. W. 981 (App. Br. p. 7), and establishes a personal liability, the suggestion is not strongly advanced, for in the following paragraph of its brief, Appellant states that the assessment is a lien on the stock, *not* a personal liability (App. Br. p. 8). No doubt the point is not pressed because if Appellant paid off Appellees' personal liabilities without their request, it acted as a mere volunteer and would not be entitled to reimbursement. (*McMillan v. O'Brien* (1934), 219 Cal. 775, 779, 29 P. 2d 183; 20 Cal. Jur., "Payment," Sec. 7, p. 907.)

The procedure set forth in Section 1673, relating to a method of collection of a shareholder's debt to the corporation, has no relation to the procedures which might be adopted by a corporation to assess its paid-up shares, under Section 1603(6). Procedure for assessment of paid-up shares should be set forth in the articles of incorporation or the by-laws of the corporation, including proper provisions for notice, protest, foreclosure, sale, redemption, call, or cancellation of the stock, and the like. The articles of incorporation and by-laws of the corporations involved here *may* contain such provisions, but they do not appear in the record of this case. Indeed,

while Appellant discusses the effect of the assessments as liens or charges, there is nothing in the record (except Appellants' possibly mistaken fear of foreclosure) to indicate that the ditch companies actually had the legal power or right to levy assessments, or to foreclose the stock, or take any further steps, or even to deny the delinquent shareholder the use of the ditches. What the corporations must do to create liens, if they can do so, does not appear. The procedure by which shareholders might protest or contest assessments is not shown, nor the effect such protest or contest might have upon any "lien date." While the date upon which the assessments became a lien or charge against the stock or other property is not material, for reasons set forth elsewhere herein, since the date certainly postdated the opening of escrow, it must be emphasized that the record fails to set forth facts sufficient to establish the existence of any charge or lien against the stock or the other property.

Certainly, to establish a lien, notice to the assessee would be an essential element of due process. The record shows that as to the Old Channel Ditch Company stock the notice was not even mailed out to the shareholders until *after* the escrow had closed. Notice of the Young Ditch Company assessment was sent to stockholders before close of escrow, but the record does not show whether respondents received the notice, or whether they had taken steps to protest the assessment, or whether, prior to May 15th they would have taken steps to protest the assessment. If the assessment had already been paid before its due date by a volunteer who was not liable to make payment, such a protest would be meaningless; the payment would render moot any inquiry by Appellees into the propriety of the levy or the advisability of protesting or contesting it.

Cf. Hansen v. Bear Film Co. (1946), 28 Cal. 2d 154, 180, 168 P. 2d 946, where the court pointed out that the payment by a corporation of the alleged indebtednesses of its deceased chief stockholder, instead of requiring the creditors to file claims in the probate proceedings, was a voluntary payment for which the corporation could not take credit. It was so held, even though on the facts set forth at great length by the court the corporation might well have been held liable for the personal debts of the stockholder, who had managed the corporation as his *alter ego,* since by making payment under such circumstances, the claim was not subject to the court's scrutiny. The case is similar to the present in that while Appellant may have been justified in paying Appellees' obligation on May 15th, or even on the expiration of any protest or contest period, any payment before that time was a mere voluntary act.

5. Summation.

While the parties did not specify in their contract who should pay the assessments involved, yet, should the assessments be classified as "other expenses affecting said property," the full amount thereof must be prorated to the period for which Appellant is liable for payment. Absent a contractual provision as to who must pay such an assessment, under California law the duty falls upon Appellant, the grantee.

Even if the contract and the law provided otherwise than as stated above, by paying the assessments before the stated due date Appellant rendered any protest or contest of the levy of assessment impractical and moot; and as a mere volunteer Appellant would not be entitled to reimbursement.

Conclusion.

Judgment of the District Court was correct, and it should be affirmed.

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APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

SUMMATION OF FACT.

It is clear from the statement of facts of both appellant and appellees that the facts are of little importance.

The statement of appellant regarding the materiality or admissibility of the evidence is made in line with the Stipulation of Fact which was on the basis that either party had a right to question materiality of any portion of the evidence, and the doubtful materiality and little weight of the evidence regarding the clearing of the ditches every four years [Tr. Rec. p. 39] is clear in the determination of the issues in this case.

One further matter of fact should be clarified. Appellees have questioned, at pages 9 and 10 of their brief, the right and power of the corporation to create the liens or the voluntary aspects of any payment by appellant. A reading of the entire record to date clearly shows that at no stage of the proceedings was there any question of the right or power of the corporations to levy the assessment. The entire additional stipulation of fact [Tr. Rec. pp. 35-40] clearly shows an acceptance on the part of both appellant and appellees of the power of these corporations to levy the assessments, for in fact it was agreed that the payments were made to free the stock of the assessments levied. [Tr. Rec. p. 38.]

The parties have by stipulation agreed that a lien was created by reason of the assessment. [See items 9, 10 and 11 of Additional Stipulation of Fact, Tr. Rec. pp. 37-38.] In addition thereto, it should be noted that the parties also stipulated that like assessments had been made at irregular intervals in the past. [Tr. Rec. p. 39.] In these stipulations it can hardly be held that the parties did not have in mind the right and power of the corporations to levy such assessments.

No further reference will be made in this brief to that portion of appellees' brief labeled (4) and which belabors the right or power of the corporations to assess the stock.

II.

ARGUMENT.

1. The Assessments Are Included Within the Terms of the Contract.

As pointed out in appellant's opening brief (pp. 8-11), there are two provisions of the contract pertaining to indebtedness and expense, and it is clear from a reading of the entire instrument that the parties intended to include not some of the expenditures or some of the indebtedness, but rather they intended to include all of them. The parties were most meticulous in stating that the expenses and taxes and insurance were to be "prorated" as of the close of escrow. [Tr. Rec. p. 24.]

The appellees argue that at best, as expenses, a proration should take effect over a base period of four years. This argument wholly fails to appreciate the fact of proration. Proration unless it is made by agreement is never on an indefinite period.

The four years arrived at in this instance was pursuant to the stipulation of fact, which stipulation further points out that the assessments were made at irregular intervals, but that for the purpose of clearing ditches it had been done from three to five years apart. It is therefore manifestly impossible to prorate these expenses on any basis other than a 100% at the time the expenses fall due for the purposes of an escrow.

In order to show that such prorations are possible, the appellees cite depreciation for tax deductions, and the fact

that accountants prorate such expenses frequently. This is, of course, no answer in the sale of real property. There are many places in the tax law where estimates of the life of a building are permissible, yet this does not permit of an accurate proration except for the very purpose of taxation, certainly not for the basis of proration as the term is used in escrows.

Appellees further state that as expenses the assessments were not to be covered for the reason they did not become expenses until paid, which was after the close of escrow. Again, appellees completely miss the use of the term. The expense was due and payable at the instant the lien was created. The dates of May 15 which followed the close of the escrow were not "due dates" but "past due dates." Upon this date if the payment had not been made, arose the right of the corporations to sell the stock to satisfy the lien. It is not synonymous with being due.

In this connection it may be likened to taxes on real property, where in California taxes are payable from July 1 to June 30, yet payments on account thereof are not paid even on the first installment until the month of December. On proration of taxes in September, it cannot be argued that there is no tax due by the seller as the payment does not have to be made until December. He is still liable for that proration of the taxes as preceded the date of sale commencing July 1. Therefore to state that the assessments were not expenses because not paid, is a completely fallicious argument.

2. Under California Law Assessments Levied After an Escrow Is Opened Do Not Fall Upon the Purchaser.

Appellees under Point (3), page 7 of their brief cite as being California law that "upon performance by the parties of the terms of the escrow, the title passes as of the date the escrow was opened." This is not the law of the State of California. Even though the brief cites cases, it should be noted that each of the cases cited relies upon the exceptions to the general rule.

The general rule is, where a deed is placed in escrow, that a conveyance takes effect upon the performance of the prescribed conditions and the delivery *by* the depository. (Civ. Code, Sec. 1057.)

It has likewise been held that upon performance of all the conditions of the escrow by the grantee, title will be deemed to have passed, even though the depository does not in fact make the delivery. (*Hagge v. Drew,* 27 Cal. 2d 368.) Such is not our case, although at pages 8 and 9, appellees indicate it is. There is nothing in this record which shows that the grantee appellant had any act to perform toward the passage of this title. This was an exchange agreement. There was no question of the appellant having done otherwise than meet the terms of the escrow, and later it was the act of the appellees which was to close the escrow. Certainly no title passes until the property is in a condition to have title thereto passed.

The clearest expression of the true rule, the doctrine of relation back can be found in *Blumenthal v. Liebman,* 109 Cal. App. 2d 374-380, wherein it is stated (380):

> "The doctrine of relation back is recognized as an exception to the general rule, and only when the circumstances are appropriate to its application. In Miller & Lux, Inc. v. Sparkman, 128 Cal. App. 449 (17 P. 2d 772), the 'agreement entered into between the parties' showed it was their intention that the buyer, as a part of the purchase price, pay all taxes accruing after the date of execution of the instrument. Accordingly, said the court 'to effect the intention and to do equity the passing of title under the deed will be held to relate back and to take effect as and of the date of the constructive or conditional delivery,' the date the deed was placed in escrow. (P. 454; see, also, discussion of other types of circumstances in which the doctrine applies, at pp. 454-457.) We have found in the instant case no basis for applying the doctrine of relation back, in the face of the judgment rendered in the former action."

The general basic rule is illustrated in the annotator's note in A. L. R. reading as follows:

> "The general principle is well settled that upon the final delivery of an escrow instrument by the depository, until the performance of the conditions of the escrow agreement, the instrument will be treated as relating back to and taking effect at the time of its original deposit in escrow, *and a resort to this fiction is necessary to give the deed effect, to prevent injustice or to effectuate the intention of the parties.*" (Emphasis added; 117 *A. L. R.* 69, 70.)

It has already been pointed out in appellant's opening brief (pp. 6, 7) that resort to the fiction in this instance is not necessary, and will create an injustice to do so.

3. The Assessments Are the Responsibility of the Owner of the Stock.

Both appellant and appellees are agreed as to this point. Our differences lie only in two features: one, who is the owner and two, when were the assessments due. (See Appellees' Br. pp. 4 and 5, and Appellant's Op. Br. p 8.)

In connection with who is the owner, it is clear that the appellees are the owners, unless the doctrine of relation back is used, and it has been heretofore illustrated that this doctrine is not applicable to the existing facts. Therefore appellees were the owners of the stock up to the close of escrow. The assessments having been levied prior to the close of escrow, it is the position of appellant that the responsibility for the payment falls upon the appellees, as the payment is merely the administrative factor after the assessments became due.

In relation to the date of May 15, this brief has previously indicated that this is a past due date and not a due date. It is therefore clear that full responsibility for the assessments must fall upon the appellees.

Conclusion.

It is respectfully submitted that court below erred in its conclusions by a misapplication of the law to the stipulated fact and that therefore the decision of the District Court must be reversed.

Respectfully submitted,

MACFARLANE, SCHAEFER & HAUN,

By E. J. CALDECOTT,

Attorneys for Appellant.

No. 14245

United States
Court of Appeals
for the Ninth Circuit

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Appellant,

vs.

ALBERT GONZALES, Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

No. 14245

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In the United States District Court for the Eastern District of Washington, Southern Division

No. 739

WILLIAM GIRON, ALBERT GONZALES, CECIL COLUYA, Petitioners,

vs.

JOHN R. CRANOR, et al., Superintendent of the Washington State Penitentiary, Walla Walla, Washington, Respondent.

MOTION FOR LEAVE TO FILE AN AFFIDAVIT IN SUPPORT TO PROCEED IN FORMA PAUPERIS

Comes now the Petitioners William Giron, Albert Gonzales, Cecil Coluya, and moves the above entitled Court for leave to file their application for a Writ of Habeas Corpus, as petitioners believe they have basis for a Writ of Habeas Corpus. Petitioners pray for an order to the Clerk of said Court to file and proceed, and all orders will issue by this Court.

Your Petitioners are without means, funds, or property or income to pay filing fee, or any part thereof, and prays to proceed in Form Pauperis.

/s/ WILLIAM GIRON,
Petitioner Acting Pro Se

Witnesses: Signed: Arthur Hearne, Robert E. Le Nois. [1*]

[Endorsed]: Filed November 7, 1952.

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* Page numbering appearing at foot of page of original Certified Transcript of Record.

[Title of District Court and Cause.]

ORDER TO FILE IN FORMA PAUPERIS

It appears to the Court that the above named petitioners are desirous of filing a petition for a Writ of Habeas Corpus in this court under Forma Pauperis. It further appears that said petitioners have filed herein their affidavit, setting forth the facts concerning their poverty, and the Court is fully advised in the premises.

It is now, therefore, ordered and decreed that the clerk of this Court be, and he is hereby directed to receive and file the petition for Writ of Habeas Corpus of the above named petitioners, without payment of any fees.

Done by the Court this 7th day of November, 1952.

/s/ SAM M. DRIVER,
United States District Judge

[Endorsed]: Filed November 7, 1952. [2]

[Title of District Court and Cause.]

APPLICATION PETITIONS FOR A WRIT OF HABEAS CORPUS

To the Honorable Sam M. Driver, United States District Court Judge, for the Eastern District of Washington at Spokane. Petitioners William Giron, Albert Gonzales, Cecil Coluya, petitions for a Writ

of Habeas Corpus respectfully represents and shows; to-wit: and a show cause order will issue.

I.

That your petitioners are unlawfully imprisoned, detained, confined and restrained of their liberty by one John R. Cranor, as the Superintendent of the Washington State Penitentiary at Walla Walla.

II.

That such restraint and detention is not by reason of any final judgment of a court of competent jurisdiction, or by reason of any order adjudging your petitioners to be in contempt of any court, officer or other tribunal.

III.

That your petitioners are illegally and unlawfully imprisoned, detained, confined and restrained of their liberty by one John R. Cranor, as aforesaid, [3] under and by virtue of an alleged judgment of conviction and sentence entered on or about the 10th day of April, 1950, in the Superior Court of the State of Washington, for King County, following conviction by a jury of the charge of Murder in the First Degree, Case No. 25721, King County, Washington; trial judge was James W. Hodson, King County Superior Court.

IV.

That the said illegal judgment of conviction and sentence, and the commitment by virtue of which your petitioners are held, was obtained in violation

of the constitutional rights guaranteed to your petitioners by the Constitution of the United States and particularly of the 5th and 6th Amendments thereof, and also the Constitution of the State of Washington in this.

V.

Your petitioners allege: that contrary to rights guaranteed to them by the 5th, 4th, and 14th Amendments to the Constitution of the United States have all been violated to your petitioners in King County Washington by City Police and Trial Court and Prosecuting Attorney in this case and said Respondent.

VI.

Your petitioners have exhausted all State remedies, Case No. 32148 Supreme Court State of Washington, derived, also Writ of Certiorari Case No. 100 Supreme Court of these United States being denied on October 13, 1952. (See Exhibit A.)

Board of Prison Terms and Paroles members have not set a minimum sentence or have they saw any parole board members since arriving here.

Trial Judge ordered parole board to set a sentence which they did not do.

King County officials have used Coercion and Duress on your petitioners all against the Constitution of the United States.

VII.

The petitioners Albert Gonzales, William Giron, and Cecil Coluya, and each of them, were charged by information with the purported crime of murder

in the first degree, alleged to have been committed in King County on or about the 10th day of January, 1950. [4]

The trial dates were from the 20th day of March, 1950, through the 10th day of April, 1950, and on the last named date the jury returned a verdict of guilty as to each of the petitioners.

Following denial of a motion for a new trial, the petitioners were each sentenced on the 28th day of April, 1950, as follows:

"And no sufficient cause being shown or appearing to the Court, the court renders its judgment: That whereas the said Defendants having been duly convicted on the 10th day of April, 1950, in this Court of the crime of Murder in the First Degree, it is therefore Ordered, Adjudged and Decreed that the said Defendants are guilty of the crime of Murder in the First Degree and that they be punished by confinement at hard labor in the penitentiary of the State of Washington for a maximum term of not more than their Natural Life Years, and a minimum term to be fixed by the Board of Prison Terms and Paroles."

The penalty for first degree murder is set forth in Rem. Rev. Stat., 2392, and it provides:

Murder in the first degree shall be punished by imprisonment in the State Penitentiary for life.

VIII.

At the time petitioners were sentenced, there was also in full force and effect Rem. Rev. Stat., 10249-2, which provides that when a person is con-

victed of a felony, except treason, murder in the first degree, carnal knowledge of a child under 10 years, the court shall fix the maximum sentence of such person only, and that shall be the maximum provided by the law for the crime for which such person was convicted.

IX.

Under 10249-2, Supra, the Board of Prison Terms and Paroles is authorized to fix the duration of confinement of all convicted persons, except those specifically exempted from the operation of the act as above set forth. See In re Henry vs. Webb, 121 Wash., Dec. 263, where the court held that the Board of Prison Terms and Paroles had no authority to fix a "duration of confinement" in the cases where convicted persons were sentenced for the crimes specifically excepted from the operation of 10249-2, supra. [5]

The 1951 Legislature amended this statute by adding to chapter 9.95 R.C.W., as derived from chapter 92, Laws of 1947, a new section which, so far as material here, reads:

"The Board of Prison Terms and Paroles is hereby granted authority to parole any person sentenced to the penitentiary or the reformatory, under a mandatory life sentence, who has been continuously confined therein for a period of twenty years (consecutive) less earned good time."

From the foregoing it is obvious that petitioners were convicted of first degree murder and sentenced as second degree.

Argument and Authorities

The petitioners contend that they were denied the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that reversible errors were committed at their trial, and thereafter they were denied the right of appeal through no fault of their own. In order for the court to fully understand the grounds upon which these contentions are based, it is necessary for the petitioners to set forth the facts as are material to the questions involved.

Petitioner Gonzales was arrested on suspicion during the early hours of Saturday, January 7, 1950, and thereafter was held without charge by the Seattle Police Department until Tuesday, January 11, 1950. During this illegal detention, the police "beat" two confessions out of Gonzales. The second confession implicated petitioners Giron and Coluya in the shooting of one Fidel Molina. The trial judge, James W. Hodson, permitted the prosecuting attorney to use these confessions in order to obtain the convictions in questions. Without these confessions, the state was without sufficient evidence to obtain a first degree murder conviction, or any conviction.

Prior to the trial, petitioner Giron employed Attorney Will G. Beardslee to represent him at the trial, and also to prosecute an appeal in the event of conviction. For this service, Giron and his wife executed deeds to Beardslee covering an apartment located at 1314 East Terrace, Seattle, and the family home located at 552 16th Street, Seattle. After conviction, this attorney sold the apartment

house, and paid off a mortgage on the home, and deeded it back to the petitioner and his wife, and kept the balance of the money obtained from the sale of the apartment as his fee. [6]

Petitioner Gonzales was represented at the trial by Attorneys J. E. Freeley and D. Van Fredenberg. Arrangements was also made with these attorneys prior to the trial to take an appeal in the event of conviction.

Petitioner Coluya was represented at the trial by Attorney Will G. Beardslee, appointed by the Court.

In addition to using the confessions of Gonzales as evidence, Deputy Prosecuting Attorney F. A. Walterskirchen, in his opening statement to the jury, referred to Coluya as a "noted gunman". At the trial, Gonzales identified Police Officer Thomas as the person who "beat" the confessions out of him. Naturally, this was denied by Officer Thomas. However, the record of this case affirmatively discloses that the State used these confessions of Gonzales over the objections of the attorneys representing each of the petitioners.

In the cases of Watts vs. State of Indiana, 69 S. Ct. 1347; Turner vs. Commonwealth of Pennsylvania, 69 S. Ct. 1352; and Harris vs. State of South Carolina, 69 S. Ct. 1354, we find the following in Mr. Justice Jackson's opinion:

"In each case police were confronted with one or more brutal murders which the authorities were under the highest duty to solve. Each of these murders was witnessed, and the only positive knowledge

on which a solution could be based was possessed by the killer. In each there was reasonable ground to suspect an individual but not enough legal evidence to charge him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him. This extended over varying periods. In each, confessions were made and received in evidence at the trial. Checks with external evidence, they are inherently believable, and were not shaken as to truth by anything that occurred at the trial. Each confession (nee) Confessor was convicted by a jury and state courts affirmed. This Court sets all three convictions aside."

After reciting the foregoing facts, Justice Jackson said:

"A concurring opinion, however, goes to the very limit and seems to declare for outlawing any confession, however freely given, if obtained during a period of custody between arrest and arraignment —which, in practice means all of them."

The record in the case at bar affirmatively discloses that petitioner Gonzales was arrested on suspicion during the early morning hours of Saturday, January 7, 1950, and that he was held in custody without charge by the Seattle police until two confessions were obtained, and then transferred to the custody of the county authorities on Tuesday morning, January 11, 1950, and then charged with the purported crime of murder in the first degree. [7]

The record further discloses that the state used these confessions as evidence at the trial of petition-

ers over the objections of the petitioners, and that these confessions implicated petitioners Giron and Coluya in said crime.

Under the cases cited above, the petitioners have been denied the due process of law guaranteed to them by the Fourteenth Amendments to the Constitution of the United States, since the United States Supreme Court has likewise held in the case of State vs. Ashcraft, 322 U. S. 143, that if a coerced confession is used to convict co-defendants, that such conviction is void the same as the defendant's from whom the confession was obtained.

It is, therefore, respectfully submitted that under the recent decision of the United States Supreme Court in the case of Dowd vs. Cook, 95 S. Ct. 183, the State of Washington must permit petitioners an appeal under the equal protection clause of the Fourteenth Amendment, or they may apply to the Federal courts for an order discharging them from further custody.

In the Dowd case, one Lawrence E. Cook, brought Habeas Corpus proceedings in the United States District Court in 1948. After hearing evidence, the District Court found that in 1931 the petitioner Cook was convicted of murder in an Indianna court, and was sentenced to life imprisonment, and immediately confined in the state penitentiary. Within the six-month period allowed for appeal as of right by Indiana law, Cook prepared proper appeal papers. However, his efforts to file these documents in the state supreme court was frustrated by the warden acting pursuant to prison

rules. Subsequently, but after the six-month period had expired, the ban on sending papers from the prison was lifted and Cook unsuccessfully sought to have the state courts review his conviction by coram nobis in 1937, and by habeas corpus in 1945. In 1946 his petition to the Supreme Court of Indiana for a delayed appeal was denied.

On the foregoing findings, the Federal District Court held that there has been a denial of the equal protection of the law for which the State of Indiana provided no remedy, and ordered Cook's release from prison.

On Writ of Certiorari to the United States Court of Appeals, which court had affirmed the trial court's findings, the United States Supreme Court pointed out that in that Court the State of Indiana had admitted, as it must, that a "discriminatory denial of the statutory right of appeal is a violation of the Equal Protection Clause of the Fourteenth Amendment." [8]

The State of Indiana also contended that despite the denial of equal protection, that Cook was no longer entitled to relief because he "Waived" his right of appeal. The argument was that the ban on sending papers from the prison suspended the statutory limitation of the time for review so that respondent could have appealed within six months from the date the restraint was removed in 1933. The United States Supreme Court would not accept that view, and pointed out in 1931 Indiana appellate jurisdiction apparently was conditioned on a timely filing of the proper papers, and that

the rigid rule may have been relaxed so as to provide discretionary delayed appeals for convicted defendants. The Court further pointed out that there were no indication either that there is any time limitation on the taking of delayed appeals or that such appeals will ever be heard as of right. The Court further held that:

"* * * Under the peculiar circumstances of this case, nothing short of an actual appellate determination of the merits of the conviction—according to the procedure prevailing in ordinary cases—would cure the original denial of equal protection of the law."

Through no fault of their own, the petitioners were denied the right of appeal from a conviction containing prejudicial and reversal errors.

Your petitioners pray this Honorable Court for their day in court and respondent be ordered to produce said petitioners at time and place set by the Honorable Judge Sam M. Driver.

Petitioners pray further for their liberty to be restored and a writ of habeas corpus will issue and other reliefs entitled to on the premises, for said petitioners, and all cause and detention be shown by respondent.

Respectfully prayed for this day of October 30, 1952.

/s/ WILLIAM GIRON,
Acting Pro Se

Duly Verified.

[Endorsed]: Filed November 7, 1952. [9]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

On reading the petition of William Giron, Albert Gonzales, and Cecil Coluya for a writ of habeas corpus, directed to John R. Cranor, superintendent of Washington State Penitentiary, at Walla Walla, Washington,

It Is Ordered that John R. Cranor, as superintendent of the Washington State Penitentiary, be and appear before this court, in the court room, in the Federal building, at Walla Walla, Washington, on the 16th day of December, 1952, at 9:00 o'clock a.m., then and there to show cause why a writ of habeas corpus should not issue herein, as prayed for by the above named petitioners.

It is further ordered that John R. Cranor, superintendent of the Washington State Penitentiary, be and he is hereby commanded to have the bodies of the said William Giron, Albert Gonzales, and Cecil Coluya, now detained in his custody, under safe and secure conduct, before the judge of the above entitled court, at the time and place fixed for the hearing.

It is further ordered that a copy of this order be mailed to the petitioners and to the attorney general of the State of Washington, together with a copy of the petition for a writ of habeas corpus, and that a copy of this order and the petition for a writ of habeas corpus be served upon the said John R. Cranor, superintendent of the Washington

State Penitentiary, at Walla Walla, Washington, by mail, on or before the 11th day of December, 1952.

Done by the Court this 7th day of November, 1952.

/s/ SAM M. DRIVER,
United States District Judge [11]

[Endorsed]: Filed November 7, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now respondent, John R. Cranor, superintendent of Washington State Penitentiary at Walla Walla, Washington, through his attorneys, Smith Troy, Attorney General, and Rudolph Naccarato, Assistant Attorney General, and moves the court for an order dismissing the application for a writ of habeas corpus and show cause herein on the grounds and for the reasons that this court does not have jurisdiction, and that the remedy sought by the petitioners is one which cannot be availed of through a writ of habeas corpus.

/s/ SMITH TROY,
Attorney General
/s/ RUDOLPH NACCARATO,
Assistant Attorney General [12]

Affidavit of Service by Mail attached. [13]

[Endorsed]: Filed November 19, 1952.

[Title of District Court and Cause.]

ORDER

On the filing of the petition for writ of habeas corpus in the above proceeding, the court issued a show cause order, directed to the above named respondent, returnable at Walla Walla, Washington, on the 16th day of December, 1952, at 9:30 a.m. At the hearing on that date, R. Max Etter, an attorney of Spokane, Washington, appeared as counsel for the petitioners, and, upon his motion, the matter was continued to January 20, 1953, at 10:00 o'clock a.m. For reasons, which the court deems sufficient, it is advisable to continue the hearing further, and

It is now, therefore, ordered that the hearing on the petition for writ of habeas corpus of the above named petitioners and the return date on the order to show cause are hereby continued to February 5, 1953, at 1:30 p.m., in the court room of this court, at Walla Walla, Washington.

Done by the court this 5th day of January, 1953.

/s/ SAM M. DRIVER,
United States District Judge

[Endorsed]: Filed January 5, 1953. [14]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM GIRON IN SUPPORT OF PETITION

State of Washington,
County of Walla Walla—ss.

William Giron, being first duly sworn on oath, deposes and says:

That he is one of the petitioners seeking relief by writ of habeas corpus in this court and that he makes this affidavit in support of his said petition to this court.

Your affiant is now confined in the State Penitentiary at Walla Walla, Washington, pursuant to purported judgment and sentence of a Judge of the Superior Court of the State of Washington in and for the County of King entered on the 28th day of April, 1950; that said judgment was and is illegal and void because of the facts and circumstances set out in the affidavit of Albert Gonzales which facts and circumstances are by reference included and referred to here for the benefit of your petitioner, the same as though they were fully set out in support of your petitioner's application; that your petitioner states that the purported judgment and sentence of the State Court was and is illegal and void because of the above and foregoing and further because of facts to be set out herein.

Your affiant states that at about the hour of 9 o'clock [15] or thereabouts on the morning of Jan-

uary 9, 1950, your affiant went to the Police headquarters of the Seattle Police Department in the City of Seattle, Washington, to seek information about the detention of your affiant's wife who had been placed in the King County jail without just reason on the 7th day of January, 1950; that your affiant upon making inquiry in said Seattle police headquarters concerning the reason and cause of the detention of his said wife was immediately seized and placed in a cell and on the following day, your affiant was transferred to the county jail of the County of King where on the 10th day of January, 1950, your affiant was charged with the crime of murder in the first degree; that your affiant upon being arrested was not taken before a magistrate nor was he given any hearing whatsoever, although a magistrate was then available for hearing or appearance; that likewise your affiant's wife had committed no crime and her detention had been effected solely for the purpose of compelling the appearance of your said affiant.

That thereafter your affiant employed an attorney in the City of Seattle to defend him against the charge made against him, to-wit: one W. G. Beardslee, and said affiant employed said attorney to defend him in all stages of the proceedings and in appeals to the appellate court in the event of conviction on said charge; that as consideration for said employment your affiant and his wife deeded certain property to his said counsel, including an apartment house and the family residence; that thereafter trial was had and the only evidence pro-

duced by the State of Washington in connection with the said charge of murder, and the said shooting of one Fidel Molina, was a purported confession of one, Albert Gonzales which was wholly illegal and void and which had been wrung from the said Gonzales by certain policemen of the Seattle Police Department by coercion and bodily assault and during illegal detention of the said Gonzales; that said confession was wholly void and [16] wholly inadmissible because of its involuntary nature and the same was and is wholly untrustworthy and was and is not evidence against your said petitioner; that following said trial your petitioner was found guilty by the verdict of the jury which was based solely so far as your petitioner was concerned, upon the improper admission and use of the purported confession of Albert Gonzales heretofore referred to; that your petitioner and the other petitioners in this cause were tried jointly and not by separate trial and the said confession was used in said joint trial for the purpose of obtaining the conviction of all the defendants, including your affiant who are now the petitioners in this cause; that following said conviction, your affiant requested his attorney and expected his attorney, to perfect appeal to the Supreme Court but that for reasons unknown to affiant no proper appeal was taken or completed although a notice of appeal was made at the time your affiant was sentenced to the State Penitentiary.

That your affiant states that as a result of the sale of the apartment house which had been deeded

to his counsel, the same was thereafter sold and his said counsel received and obtained the balance of approximately $8500.00 as a fee; that, however, no appeal was perfected or taken on behalf of your affiant and he has had no review by any appellate court of the proceedings had during the trial of your affiant in the Superior Court of King County; that subsequently and on the 11th day of December, 1950, the Supreme Court of the State of Washington dismissed the said appeal and affiant was transferred to the State Penitentiary where he is now confined; that your affiant and all of the said petitioners have sought review of these matters and proceedings in the Supreme Court of the State of Washington and in the Supreme Court of the United States and your affiant and petitioner herein has had no hearing on the matters and things alleged herein and in the affidavits of other petitioners either in the Supreme Court of the State [17] of Washington or the Supreme Court of the United States; that your affiant is now in the penitentiary pursuant to a void and illegal sentence, as above set out, and because your said affiant has been denied right of appellate hearing on examination by any appellate tribunal through no fault of his own, and despite the fact that your affiant was entitled to said hearing and your affiant is therefore held pursuant to a judgment obtained in violation of due process provision of the Fourteenth Amendment to the Constitution of the United States.

/s/ WILLIAM GIRON

Subscribed and sworn to before me this 26th day of January, 1953.

[Seal] /s/ ALLAN MATHES,
Notary Public in and for the State of Washington, residing at Walla Walla. [18]

[Endorsed]: Filed February 5, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF CECIL COLUYA IN SUPPORT OF PETITION

State of Washington,
County of Walla Walla—ss.

Cecil Coluya, being first duly sworn on oath, deposes and says:

That he is one of the petitioners in this cause and that he was a defendant jointly with the other two petitioners in this cause when the case was tried in the Superior Court of King County; that he is now confined in the State Penitentiary in Walla Walla pursuant to a purported judgment of the Superior Court of King County entered on the 28th day of April, 1950, wherein your affiant along with the other two petitioners in this cause, was sentenced to life imprisonment for the alleged and purported crime of murder in the first degree; that said judgment and sentence of the Superior Court of the State of Washington, in and for the County of King, was and is a nullity and is illegal and

void because of the following: your affiant states that on the 8th day of January, 1950, he was arrested at his home without any warrant of any kind and placed in the city jail of the City of Seattle, Washington, and held without any charge whatsoever until Tuesday, the 10th day of January, 1950, when he was transferred to the King County jail where he was then charged with the purported crime of murder in the first degree; [19] that following the arrest of your affiant he was not only held without charge but he was not taken before any magistrate for the purpose of advising him of any charge and he was not advised of any of his rights concerning his right to counsel or otherwise.

Your affiant states that he was without funds to employ an attorney of his own selection and that therefore the court appointed counsel for him for the trial which terminated with a jury verdict of guilty against your affiant and other petitioners on the 10th day of April, 1950; that the only evidence of any substantial character or nature and the only evidence upon which any conviction of your affiant could be based, was a purported confession of one Albert Gonzales which had been obtained from the said Albert Gonzales by coercion, abuse and physical assault on said Gonzales by the Seattle Police Department and the only other testimony of any substance or character against your said affiant was testimony which your affiant states was of a perjured character; that after the conviction of your said affiant he made repeated requests for permission and for the right to appeal his said cause in

the form of forma pauperus but your said affiant was unable to secure counsel for said purpose and there was nothing done by the said court to afford any further remedy to your said affiant; that your affiant was tried jointly with the other petitioners and was convicted by reason of the use by the state of statements, given under coercion and duress, of Albert Gonzales and your affiant was not afforded the protection of due process guaranteed by the Fourteenth Amendment to the Federal Constitution and your affiant further states that no review has ever been given by any federal court of original jurisdiction to the facts and circumstances alleged herein; that your affiant is restrained of his liberty solely as the result of his conviction based upon the use by the State at the trial of your affiant of an illegal and void statement [20] and confession of one, Albert Gonzales.

/s/ CECIL COLUYA

Subscribed and sworn to before me this 26th day of January, 1953.

[Seal] /s/ ALLAN MATHES,
Notary Public in and for the State of Washington, residing at Walla Walla. [21]

[Endorsed]: Filed February 5, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF ALBERT GONZALES IN SUPPORT OF PETITION

State of Washington,
County of Walla Walla—ss.

Albert Gonzales, being first duly sworn upon his oath, deposes and says:

That he is one of the petitioners who has made application for writ of habeas corpus in the above entitled court, the other two petitioners being William Giron and Cecil Coluya; that all of your said petitioners are confined in the State Penitentiary in Walla Wallla, Washington, pursuant to a purported judgment and sentence entered by the Superior Court of the County of King, State of Washington, following trial of your affiant and other petitioners on a charge of first degree murder upon which a verdict of guilty was returned by the jury.

Your affiant states that the sentence of the court was void and illegal and that the confinement of your affiant is now illegal because of the following facts occurring prior to and at the time of trial, which deprived petitioner of his rights guaranteed by the Constitution of the United States of America; that at about the hour of 1:30 a.m. on Saturday, January 7, 1950, your affiant was arrested in a taxicab on Renton Avenue near Myrtle Street in Seattle, Washington, by certain police officers of the [22] City of Seattle; that at the time of the arrest of your affiant, he was not advised by any of the

police officers with regard to the reason for his arrest, nor did any of the said police officers display, show or read to your affiant a warrant for his arrest, nor did any of said officers advise your affiant that there was any warrant in their possession or the possession of others calling for the arrest of your affiant, and he was told that he was being taken to the police headquarters of the Seattle Police for questioning concerning some minor affair or affairs.

Thereupon your affiant was taken to police headquarters of the Police Department of the City of Seattle and upon arrival at said headquarters was taken to the office of one police officer, Austin Seth, where he was questioned for a lengthy period of time by police officers Thomas and Ryan of the Police Department of the City of Seattle with regard to the movements and whereabouts of your affiant during the several hours preceding his arrest; that your affiant was then placed in a jail cell which was locked and he was not advised as to any reason for his detention; that some 30 minutes after your affiant had been detained and locked up following the questioning heretofore set out, he was again removed from his cell and taken into a room in police headquarters and he was again questioned, threatened and abused by said police officers of the Seattle Police Department, who insisted that your affiant admit that he, your affiant, had shot one Fidel Molina during the early part of Saturday morning, January 7, 1950; that during this time your affiant was abused and threatened to such an

extent that he feared for the safety of his person and because of such fear he signed a written statement for the Seattle Police Department at about 5:00 a.m. on the morning of January 7, 1950; that your affiant in said statement told said police officers about some of his movements but because of the fear that your affiant had arising out of the threats, abuse and coercion of said police officers he told them merely a few things that would indicate his whole knowledge [23] of those things which said officers demanded to know but your affiant in no wise admitted any complicity in the shooting of the said Fidel Molina whatsoever; that following the signing of said statement at the time of 5:00 a.m. on January 7, 1950, your affiant was continually questioned, abused and threatened by certain police officers and your affiant was assaulted by several police officers and in particular by one officer, Thomas, and your affiant was continually questioned throughout the day of Saturday, January 7, 1950, and into the late evening of January 7, 1950, and until after the hour of 2:00 a.m. on January 8, 1950; that during said questioning your affiant was continually subjected to the abuse and threats of the police officers and was not allowed to secure rest or comfort from said questioning whatsoever; that during all of the said time there was available a judge or magistrate before which your affiant could and should have been taken for the purpose of advising your affiant as to all of his rights, including your affiant's right to have counsel, and your affiant's right not to testify against

himself or to be subject to threats, coercion, duress and bodily assault; that at said time, to-wit: approximately 2:00 a.m. on the morning of the 8th day of January, 1950, your affiant signed a statement implicating your affiant and the two other petitioners herein, William Giron and Cecil Colnya, and your affiant signed such statement wholly and solely because of the fear of your affiant for the safety of his person and life arising from the threats, abuse and assault of the police officers of the City of Seattle; that both of said statements and confessions were obtained by said police officers before your affiant had ever been charged with any crime or arrested by warrant or arraigned before any magistrate or any court of competent jurisdiction; that after your affiant had signed the aforesaid statements and the confession of January 8, 1950, police officers Seth and Sprinkle brought your affiant from the jail into the office of the Police Building where [24] they compelled, by devious means, the affiant to admit certain parts of the said statement by question, answer and oral reading, and these statements were taken down on a wire recorder hidden in said room and without the knowledge or voluntary consent of said affiant who was in fear at all times of his very being and life.

That thereafter and on Tuesday, January 10th, your affiant was transferred to the county jail and was first charged with any crime, to-wit: the purported charge of murder in the first degree.

Your affiant states that during the trial of your affiant and petitioners herein, which terminated

with the finding of the jury of guilty on April 10, 1950, the prosecuting officials over the repeated objections of the attorneys for yaur affiant and petitioners, were permitted to read to the jury and to introduce in evidence the said purported confession of affiant which was in fact no confession at all, but which was an involuntary coerced statement of no value whatsoever, and that had it not been for said statement, the said prosecuting authorities would not have had evidence of a sufficiency or any evidence whatsoever to warrant and justify the conviction of your said affiant and petitioners herein.

Your affiant is a Filipino and had never been in trouble before and was not acquainted with any of the methods of the law enforcement officers and was not acquainted with his rights in said matter and your affiant following said trial relied upon counsel to perfect an appeal to the Supreme Court and which counsel had represented to affiant that such appeal would be perfected but your affiant was unable to pay additional attorney fees and the costs of such appeal and therefore, because of the lack of funds, and the refusal of said attorneys to provide further an appeal even in forma pauperus form your petitioner was foreclosed from any further proceedings or examination by an appellant tribunal. [25]

Your affiant states that all of the said confession was obtained in the manner aforesaid and your affiant states that the fact has never been denied that your affiant was not given any hearing before a city magistrate or arraigned or advised of his rights

at any time prior to the charge of murder being lodged against him, and your affiant states that said statements were worthless, valueless and untrustworthy and were coerced from your affiant in the manner set forth in this affidavit.

/s/ ALBERT A. GONZALES,

Subscribed and sworn to before me this 26th day of January, 1953.

[Seal] /s/ ALLAN MATHES,
Notary Public in and for the State of Washington, residing at Walla Walla. [26]

[Endorsed]: Filed February 5, 1953.

[Title of District Court and Cause.]

RECORD OF PROCEEDINGS

Be it remembered that the above entitled cause came on before the Honorable Sam M. Driver, Judge of the said Court, on February 5, 1953, and July 14, 1953, at Walla Walla, Washington, the petitioner Gonzales being personally present at each of the said hearings, and on December 17, 1953, at Yakima, Washington, and being represented by R. Max Etter, his attorney, on each occasion; the respondent being represented by Cyrus A. Dimmick, Assistant Attorney General of the State of Washington; and the following proceedings were had, to wit: [29]

The Court: All right, you may proceed if you

are ready, gentlemen. Oh, let's see, these affidavits are new to me here.

Mr. Etter: Yes. You will recall, your Honor, that when your Honor set this over until the 20th and then until the 5th, I pointed out to your Honor that in a petition which had been drawn pro se by the petitioners, they had made a statement about coercion and I asked your Honor if you felt it was necessary that I redraw the petition and specify all of the acts, and you advised me that that wouldn't be required; that if there was evidence of such, it could be adduced in open court by testimony or in the form of affidavits, and those are the affidavits which have been drawn and filed in this case and I have particular reference to the affidavit on file of Albert Gonzales, your Honor, and the testimony would adduce very little more than that which is set up in the affidavit, except that, with the Court's permission, I should like to put into evidence two exhibits which are referred to in the affidavit of Albert Gonzales, and those two exhibits are the alleged statements or admissions or confessions that are involved and they are under attack in the affidavit in this proceeding.

With the Court's permission, I will call Mr. [30] Gonzales for that limited purpose and possibly for some other reason, if the Court deems it desirable after having examined the affidavit.

The Court: There are practical difficulties that are presented in these cases, particularly where the defendants are without counsel. I know of no method of subpoenaing witnesses in here at govern-

ment expense. I am constantly faced with requests on the part of these petitioners to subpoena some witness and, if he hasn't the funds to pay the witness fees, I know of no way that I can do it. The Administrative Office will not approve it, and if I subpoenaed them in here, there would be hard feelings because they wouldn't get any witness fees and they would expect the government to pay it, I presume. But the statute—I haven't the section in mind at the moment, but you gentlemen probably know the one I refer to—provides that in these hearings affidavits may be used, that is, the Court may authorize the use of affidavits, but it provides that if affidavits are used, the opposing party shall be given an opportunity, I believe, to submit interrogatories to the affiant. Now there is no specification as to how that should be done or the mechanics of it, but I think the spirit of it is that if the opposite party desires to do so, they should have an opportunity to submit counter-affidavits or to submit interrogatories or take the deposition of the affiant. [31]

In this case, of course, the petitioners are here and counsel would have the privilege of cross examining them if he cares to do so.

Mr. Etter: That is correct.

The Court: This is a civil action; there isn't any question of compelling them to give evidence against themselves.

Mr. Etter: That is correct.

The Court: Have you seen these affidavits, Mr. Dimmick?

Mr. Dimmick: Yes, your Honor. I think I have noted the acceptance on the original application.

The Court: Well, I suppose, unless you can tell me the substance of them here——

Mr. Etter: I can do that, your Honor.

Mr. Dimmick: I think I sent those back to Mr. Etter on February 3rd.

Mr. Etter: That is correct, and they were filed.

The Court: Well, they probably were in the file here, but I have been so preoccupied with other matters I didn't get an opportunity to read them, so that if you can tell me their contents, it might save my time in reading them.

Mr. Etter: I can state it briefly, possibly give you an outline of what occurred in the case, your Honor, not by way of argument, so your Honor can follow the affidavits. [32]

The Court: Yes.

Mr. Etter: The criminal action which was brought against the three defendants who are seated over here, that is, Mr. Giron, Mr. Coluya and Mr. Gonzales, was filed against them, a criminal information, charging murder. The facts seemed to indicate that another Philippino by the name of Molina had been shot in the City of Seattle on the evening of January 6th or the early morning of January 7th of 1950. As a result of it, to get right down to cases, these three people, these three defendants, were arrested in varying stages of the investigation and were charged with the murder, tried and found guilty by the verdict of the jury.

An appeal was attempted to be taken by notice

of appeal. It was fruitless, however, and it was not prosecuted further on behalf of any one of the defendants.

The controversy here arises from the use of a confession. It appears from the affidavit of Albert Gonzales that what occurred, your Honor, was generally this:

After the ordinary statement of his confinement in the penitentiary by virtue of what we call illegal process—and this is all set out in the affidavit of Gonzales—on the evening of January 7th at about the hour—or, rather, in the morning of January 7th, that is, about 1:30 a.m., Gonzales, one of the petitioners, was arrested, seized and arrested in Seattle about 1:30, and at the time of his [33] arrest by the police officers, he was not advised that there was any warrant for his arrest, nor did the police officers have any warrant to serve upon him.

The affidavit further alleges that there was no statement made to him as to the purpose of the arrest. He was told he was being taken into the police headquarters of the City of Seattle Police Department, which was then located, as your Honor probably knows, in that old building down on Yesler Way, which has since been replaced by the new building. He was taken there for questioning.

When he was taken into the headquarters, he was taken to the offices of the police by an Austin Seth, where he was questioned for some time by two police officers whom he names, one Thomas and one Ryan, who were detectives of the Police Department of the City of Seattle. They questioned

him with regard to his movements and his whereabouts on the evening preceding the alleged shooting and murder of this fellow Molinda, who was supposedly some pumpkins in the Philippino colony over there and who operated some kind of a gambling establishment down below the line.

After he had been taken in and detained, he was questioned and after his questioning he was put in a cell and then brought out again and was continually questioned. The affidavit indicates that what actually happened was that during the course of the questioning, one of the Seattle [34] police officers, or two of them at least whom he names, Thomas and one other one, threatened him with physical violence and, in fact, did inflict physical violence on him.

The evidence will show that this one police officer, according to the evidence, assaulted him physically and beat him on one occasion. This is not in the affidavit; it is further elucidation of the assault that happened; but there were threats and coercion and physical assaults upon his body and person during the questioning.

I might say this, your Honor, that the questioning started at approximately 1:30 a.m. on the 7th and continued all of that morning, it continued all Saturday morning, that is, the hours from 1:30 down to 6:00, from 6:00 on up to noon, and it continued all the way around. At about 5:00 o'clock on Saturday morning, about three and a half hours after the arrest, there was a statement written by one of the police officers to which Mr. Gonzales put

his signature and which we will introduce in evidence, a photostat which we have received, in which there is some reference made to his movements, but a denial of any participation or knowledge of the particular acts. In other words, there is nothing in this first one that would prove at all that this man was a participant. But the purpose, according to the affidavit, of giving this was to get these people to lay off.

But, anyway, after he gave this statement, the [35] questioning continued. That was after five o'clock. I might point out to your Honor that it is marked on here at 5:00 a.m., January 7, 1950; that thereafter and from approximately five o'clock all through that morning and all through that afternoon and all into the night and into Sunday morning at about 2:10; in other words, a total of approximately 26 hours of solid questioning in relays by these policemen over there, Mr. Gonzales, who had never been in a jail before, had never seen a police station before, knew nothing about his rights, with about a ninth grade education, finally gave this statement upon the further threat that he was going to get just what they had given him before if he didn't come through and tell them something.

So this last statement then was written out by one of the officers at about 2:10 a.m. on Sunday morning following the arrest.

The Court: He was arrested Friday, you say?

Mr. Etter: He was arrested Friday. Well, I should say early Saturday morning, 1:00 o'clock Saturday morning.

The Court: Yes.

Mr. Etter: So he was subjected to continual questioning and the physical assaults of two of these officers until 2:10 a.m., Sunday morning, the time that is marked on this statement, when he finally made a lot of these statements implicating himself, implicating Coluya and implicating [36] Giron, supposedly, in movements that led up to this shooting out in Renton, the southerly part of the City of Seattle, of this fellow Molina.

In these statements, he makes one statement: "I knew Molina was after me and I had to get him first." And it is indicated further in the statement that some years ago Gonzales' brother was shot and killed in the City of Seattle and the suspect was Molina, who apparently was top man in the gambling and all the rest of it over there, and therefore the motive set out in this, which is not in his handwriting at all, was that this fellow over here, Gonzales, was going to have to get this other fellow before he got him, and there is a lot of that stuff, anyway.

But following this confession which was rung out of him at 2:10, in other words, about 26 hours after he was detained, he was still detained over Sunday and over Monday. Then on Tuesday, in other words, Saturday, Sunday, Monday, Tuesday, some four days or so later, he was taken out of confinement and moved over to the County-City Building where he was first given any hearing at all or knew what it was at all he was charged with. He was charged then with first degree murder.

In the meantime, Giron had come to his home on Saturday morning, been out and come back to his home on Saturday morning. He had a little boarding house over there. [37] His affidavit indicates he got home and his wife wasn't there, so he asked one of the tenants where his wife was and they said that the Police Department had come up to his house and picked up his wife and had her down to the police station. So he promptly got himself an attorney and asked the attorney what he should do, and the attorney, along with this man Giron, went down to the police station, where Giron was promptly apprehended by the police and thrown into a cell and his wife was then released, the idea being they wanted to hold the wife until he showed up.

During that time, on Monday or Tuesday, this man Coluya, who is also implicated in this same confession, or these two confessions, one of which is of very little evidentiary value as far as the Police Department of Seattle is concerned in finding out who murdered this Molina, and this other which implicated all of them, was picked up. They were all picked up then and charged on Tuesday or Wednesday of the following week with the murder.

They were then tried jointly, all three were tried jointly, and the affidavits set out that, other than the admissions and the evidence that is contained in the confession, there was nothing of any evidentiary or substantial value upon which any of these people could have been convicted of any crime;

that this was the confession that was used and employed, and that during the—— [38]

The Court: That was used in the trial, you mean?

Mr. Etter: This was used in the trial. These are two exhibits that were admitted, particularly this last one.

The affidavits further indicate that after the confession was secured, Gonzales was brought into another room where certain parts of this matter were read to him and he was required to answer in accordance with this. That was being taken on a wire recorder, taken directly from this after this had been secured. We haven't been able to secure any of that particular testimony, but it is in line and in conjunction with the particular matter which appears in here.

Now that, in brief outline, are the allegations that are set out in here. Of course, it is amplified in considerable extent in the affidavit as to the different officers that questioned him in relays and the different acts they performed. And I think it being a visual matter of your examination here, having made that statement, that I should put Mr. Gonzales on the stand and question him a little bit further with regard to that, and also for the purpose of admission of these exhibits for your Honor's consideration and Mr. Dimmick's.

Mr. Gonzales, will you take the stand, please?

The Court: Mr. Gonzales was the only defendant in the state case who signed a confession?

Mr. Etter: That is correct. [39]

The Court: I should think that the jury would have been instructed to limit the effect of Gonzales' confession to him alone, and not as to the other defendants. Wouldn't that have been a proper instruction?

Mr. Etter: No, I don't think it would have been a proper instruction, your Honor, because I think the Court makes it pretty clear in Ashcraft vs. Tennessee, where they tried two men jointly, a Colored youngster named Ware and a man named Ashcraft, where Ashcraft was charged with procuring Ware to kill his wife and Ware had told them under some confession of this, the Court indicates that the use of a confession of that type is no good as against anybody when used in a joint prosecution.

The Court: What I meant to say here, ordinarily, unless by other evidence the prosecution is able to show conspiracy, whether it is charged or not, if they can show conspiracy and by independent evidence that the three defendants were members of this conspiracy, then I suppose the confession of one might be used against the others. No, it wouldn't be unless it was in furtherance of it.

Mr. Etter: In furtherance of it.

The Court: What I was thinking, if one man confesses, his confession shouldn't be used as evidence against somebody who didn't——

Mr. Etter: Absolutely correct, that's right. [40]

The Court: What was the situation in the state court trial?

Mr. Etter: I don't know what that instruction

was, your Honor. I haven't had an opportunity to examine the file. In fact, we have been unable to do that. That is my feeling of the law, that it certainly wouldn't be admissible. [41]

ALBERT GONZALES

called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. Etter): I want you to speak out as loudly as you can because Mr. Dimmick and everybody in the court has to hear and the reporter and the acoustics aren't very good.

You state your name, please.

A. Albert Gonzales.

Q. And you are now confined in the Washington State Penitenitary pursuant to an order and verdict—or verdict and commitment and order of the Superior Court of King County?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And you are one of the petitioners in the case involving William Giron, Albert Gonzales and Cecil Coluya, who petitioned this Court for writ of habeas corpus, is that correct? You are the three petitioners? A. Yes, sir.

Q. How old a man are you?

A. I am 45 now, sir.

Q. You are 45? A. Yes, sir. [42]

Q. Have you a family? A. No, sir.

Q. You have no family. And what education

(Testimony of Albert Gonzales.)

have you ever had? A. Eighth grade, sir.

Q. What kind of work have you ever done?

A. Well, I worked for my company, sir.

Q. What kind of work?

A. Mess attendant.

Q. Mess attendant. And any other type of work?

A. Yes, sir, I work in the Army Transport.

Q. In the Army Transport?

A. Yes, sir. Then I worked at Navy Pier, around there in Pier 91, Seattle. Then I go to Alaska every season, sir.

Q. Every season you worked in the cannery, isn't that right, in Alaska? A. Yes, sir.

Q. And when did you come over to the United States from the Philippine Islands?

A. 1929, sir.

Q. 1929. You have been here since that time?

A. Yes, sir.

Q. And you state in your affidavit that you were arrested at about 1:30 on the morning of the 7th. That would be Saturday morning, the 7th of January, 1950? A. Yes, sir. [43]

Q. Is that correct, by certain police officers of the City of Seattle? A. Yes, sir.

Q. And that you were taken then to the Police Headquarters of the City of Seattle?

A. Yes, sir.

Q. When you were arrested, was there any warrant served on you? A. Sir?

Q. Was there any warrant served on you when you were arrested? A. No, sir, no.

(Testimony of Albert Gonzales.)

Q. Were you told the purpose of your arrest?

A. They just told me they have to take me to the police station, sir.

Q. The police station? A. Yes, sir.

Q. Did you ever have a warrant of arrest served on you when you were in the police station?

A. No, sir.

Q. Beg your pardon? A. No, sir.

Q. You didn't. Now after you were taken to the police station, will you tell the Judge what happened?

A. While I was in the police station, the two policemen, they took me upstairs—— [44]

Q. Who were the two policemen?

A. Well, I don't know their names, sir.

Q. They were the first officers that arrested you?

A. Yes, the first officers from the car, from the squad car.

Q. They took you upstairs?

A. They took me upstairs and then they took my name and then they register, I guess. Then after that, they took me in the second floor again and then they hand me over to a couple of detectives down there, so the couple of detectives, they just said, "This is the guy."

Q. Who were the detectives?

A. I not speak——

Q. Tell us who they were.

A. I don't know their names, sir. But, anyway, they manacled me down there, they shoved me down in the chair.

(Testimony of Albert Gonzales.)

Q. All right, then what happened?

A. Then after that, the Sergeant asked me a question, he said, "Are you going to tell us something?" I said, "I don't know, sir." So he said—he started—said, "You have to tell us something if you know what is good for you," he said.

Q. All right——

A. So I got kind of scared. Then he said, "What did you do with Molina?" I said, "I don't know, sir." So I said—I requested my lawyer, if I could call my lawyer. [45] He said, "You're not going to call anybody until you're going to make a statement," he said.

Q. Who said that, now?

A. The Sergeant, sir.

Q. Who was that, Thomas?

A. Sergeant Ryan.

Q. Ryan? A. Yes, sir.

Q. Sergeant Ryan, and he said you weren't going to get a lawyer until you told them something, is that it? A. Yes, sir.

Q. All right?

A. And then after that, the couple of detectives came again, he said, "Well, if you don't want to talk, we take him upstairs and then we will make him talk," he said.

Q. All right?

A. So then Sergeant Ryan, he said, "He'll talk." So after that Sergeant Ryan asked me again if I would make a statement, and I said, "I don't know, sir. I don't know anything about it, sir. I

(Testimony of Albert Gonzales.)

wish I could call up my lawyer." "I told you before that you're not going to see anybody and call up anybody until you make a statement." So I requested my consul, so he get mad, "All right," he said, "I tell you the last time," he said, "you're not going to call up anybody until you're going to make a [46] statement."

Q. Did he do anything to you physically then?

A. No, but he stand up and he get mad.

Q. All right?

A. So then about a few minutes later, there was a big detective just came in and said, "This is the guy," he said. So he just came down there and grabbed me, and I was about six or five feet from the window there and he just pushed me all the way down there, hit the radiator down there, I banged my head down there on that window.

Q. Just a minute. He threw you, you say, where?

A. Yes, threw—pushed me all the way through the window there.

Q. A window?

A. Yes, sir, hit the radiator down there, just like a register like.

Q. A radiator? A. A radiator.

Q. All right?

A. So then, "You're not going to tell us something?" "Well, I don't know, sir," I said. So he said, "You have to tell us something if you know what is good for you," he said. So I didn't even have a chance to answer, so he just beat me like this, your Honor (indicating).

(Testimony of Albert Gonzales.)

Q. Just a minute. You say he beat you. Where did he beat [47] you? Just tell us where he beat you.

A. He beat me down here and way up on the belly, my stomach up here (indicating). It hurt awful.

Q. How long did he hit you? Tell the Judge.

A. He just hit me right below the belt, right here (indicating).

Q. All right?

A. It hurt awful. So I said, "Sir, please don't hit me any more." So I have to call up twice, I have to ask him twice not to hit me any more. So then he said—and then he hit me the fourth or fifth time and it hurt me awful so I have to bend down there. So getting—he raised me up, he swear down there at me down there, and he said—do I have to repeat what he said, sir?

The Court: Yes, you should repeat it.

A. He said, "God damn it," he said, "punch you in the sidewalk. I'm going to kick your God damn face," he said.

Mr. Etter: Q. All right, then, did you give him this statement?

A. Then after that, he went out, the detective went out, and Sergeant Ryan he came down there, he come and sit down. "You better give us now." I still tried to refuse, but then he get mad, so I said—he pick up a paper, he said, "Well, who was your companion?" this and that. So he asked

(Testimony of Albert Gonzales.)

me who is my companion, so, of course, I didn't [48] give them their right name.

Q. Did you give them a statement about five o'clock? A. I don't recall the time, sir.

Q. It was toward the latter part of the morning?

A. Yes, sir.

Q. All right.

The Clerk: Petitioners' 1 for identification.

Mr. Etter: Q. Handing you what is the Petitioners' 1 for identification, this is a photostat. Without telling any of the material that is here, will you look at it and tell me what it is. Don't go into any details of what it comprises, the matter in it, though. A. Read, you say?

Q. Don't read it, just tell me what that is.

A. Well, this is the statement, I guess, sir, yes.

Q. Is that your signature?

A. Yes, sir, that is my signature.

Q. And on this page (indicating)?

A. Yes, sir.

Q. And on that page?

A. Yes, sir. Yes, that is my signature, sir.

Q. And the time marked up here at 5 a.m. on January 7th, would you say that is about right?

A. I think so, sir. Of course, I didn't remember much of the time now. [49]

Q. Did you write this out?

A. I recall I wrote—the only thing I wrote, sir, is just my name, because he wrote it.

Q. You made statements, though?

(Testimony of Albert Gonzales.)

A. Yes, because he asked me questions, this and that.

Q. I see. Now after you made this statement around five o'clock or thereafter, if we take the time on the exhibit, what then happened? What occurred then?

A. Well, he said, "So you are the brother of that Max," he said, "that this fellow killed." He said he shoot my brother without any cause at all, he said. So I reminded the previous record of Molina, about shooting my cousin about 1936 and mentioned about the shooting of the policeman and then he shoot another fellow, he killed four fellow already. So he said, "I don't want to hear anything of those things," he said. He said he don't want to hear of those records.

Q. Then what did they do with you?

A. Well, a couple of detectives came over there, said, "Come on, let's go," they said. They took me outside, sir. They took me in the house of Giron. I thought at first they were going to take me out somewhere and beat me up because I was so scared I didn't realize, because when I was in the car one of the detectives pointed a gun at my head, sir, I was so scared. He said, "If you try to [50] run away, I'm going to shoot you," he said. "How can I run away? I have my hands down behind my back." He just said, "Keep still." He just pointed the gun. I was so scared I couldn't look at that because he might liable——

Q. Did you point out Giron's house?

(Testimony of Albert Gonzales.)

A. Sir?

Q. Did you point out Giron's place?

A. Yes, he took me over there, sir.

Q. And Coluya's, too? A. No, no, sir.

Q. Not Coluya's. All right, when did they take you back to the police station, do you remember?

A. I think they took me back about ten minutes later, sir.

Q. All right. Did you stay then in the police station?

A. No—well, they questioned me for awhile down there, sir, but I cannot say any more, sir, because I am too tired, my stomach is painful.

Q. All right. What did they do then?

A. Well, they said, "You go downstairs," he said. So they took me down in my cell.

Q. In your cell?

A. While I was in my cell, I started—I stay only about five or ten minutes, they took me up.

Q. How long did this keep up?

A. Oh, I couldn't recall, sir, because they kept on coming [51] and picking me up every five or ten minutes.

Q. They were coming and bringing you out every five or ten minutes? A. Yes, sir.

Q. Did you have any trouble——

A. Yes, sir.

Q. ——with your urination after this beating?

A. I cannot urinate—there is a girl; I have to——?

The Court: Just speak right out, that's right.

(Testimony of Albert Gonzales.)

A. I cannot urinate.

Mr. Etter: Q. You couldn't. Are you able to yet? A. No, still bothers me, sir.

Q. I see. And it is over here?

A. Yes, sir. That is why I stay alone in my cell, in my own cell.

Q. You have a cell to yourself? A. Yes, sir.

Q. Did you ever have this before this beating?

A. No, sir.

Q. Had you ever been in a police station before in your life? A. Not yet, sir.

Q. Had you ever had anything to do with policemen before? A. No, sir, no.

Q. Had you ever been under arrest before in your life? A. No, sir. [52]

Q. First time you had ever been in trouble in your life? A. No, sir.

Q. Well, about two o'clock—did you say this in a general way went on all day Saturday?

A. Every ten or fifteen minutes they just keep on coming back to me. I was so tired I couldn't even move. My mind is so empty.

Q. All right, now, at two o'clock, or about two o'clock, did you make another statement?

A. Yes, sir, when Sergeant Seth——

Q. Austin Seth? A. Sergeant Austin Seth.

Q. Was there another policeman there?

A. Sprinkle.

Q. Officer Sprinkle? A. Yes, sir.

Q. Tell me——

The Court: What are those two names?

(Testimony of Albert Gonzales.)

Mr. Etter: Austin Seth and Sprinkle, S-p-r-i-n-k-l-e.

The Court: Those were the two officers?

A. Yes.

Mr. Etter: Two Seattle police officers, yes.

Q. Just prior to the time that you made this statement, Mr. Gonzales, will you tell whether or not there was any conversation or threats just before this statement was given? [53]

A. Yes, sir. While I was—when I was talking with Sergeant Seth down there in this office, why he mentioned to me that he knows my brother because he was over there about three or four weeks before he was killed.

Q. He knew your brother?

A. Yes, sir. So he was showing me a picture of a Philippino who was riddled with bullets, sir. He told me he suspected Molina that took this fellow for a ride, but there is no way to pin it on him. So I told Mr. Seth that, "Sir, if you suspect Molina, why didn't you take him in?" He say, "We don't have any evidence," but he suspects that he was the one, he said. That was around November, sir, they pick up a Philippino in the Tacoma highway there. He was riddled with bullets.

Q. All right?

A. Well, we Philippinos know the record of Molina, because personally I don't know Molina, sir, I just know his previous record, because everybody is afraid of him because he is a big man, he always talk with his gun.

(Testimony of Albert Gonzales.)

Q. What happened, though, what happened just before the conversation?

A. Well, Mr. Seth asked me if I could make a statement. I said, "I cannot make any more because I am so sick." I said, "I would like to go to my cell." So he said, "Well, this other statement is not satisfactory," he said, "the [54] other is not satisfactory." He said, "I will let Mr. Sprinkle help you," he said. So he let Mr. Sprinkle down there. He sat down, he told me to sit down, so Mr. Seth went out. So I asked Mr. Sprinkle if I could call up my lawyer, I said. He said, "I'm going to let you have your lawyer if you can give us another statement," he said. "Well, I made one already, sir. I can't make any more because I am too sick," I said. "Well," he said, "if you are not going to make one, I'm going to turn you over down there, you're going to get the same beating."

Q. He said what?

A. "You're going to get the same beating," he said. So he asked me, because I figured they was going to give me another one. "I don't know what happens," I said.

The Court: I'm not sure that I understood entirely what he said there.

(The answer was read.)

Mr. Etter: Q. All right, then, was the statement written out?

A. No, then Mr. Sprinkle took a paper and he said, "I will help you." He asked me a question, he said, "Do you know this fellow?" he said. He

(Testimony of Albert Gonzales.)

mentioned Molina—I mean Giron and Coluya. I said, "No, sir." "Well," he said, "you might as well tell us because I know everything already." I said, "Well, I don't know, sir, I made the [55] statement already, I can't make any more." So he stand up, "Are you going to make one or not?" he said. "Well, I don't know what to say, sir. There is nothing much more to say." He said, "Well, just sit down there and I will help you," he said. Kept on writing down there and——

Q. So about 2:10 on Sunday morning he wrote this statement out?

A. I think so, sir. I don't recall those times any more.

The Clerk: Petitioners' Exhibit 2.

Mr. Etter: Q. Handing you the Petitioners' Exhibit 2 for identification, being a photostat, don't read any part of this, but just look at it, if you will, and tell me what it is, if that is the statement that you signed at approximately 2:10 a.m. on Sunday morning, the 8th of January?

A. Yes. Well, he wrote that, sir, but I signed it.

Q. He wrote it? A. Yes, sir.

Q. You signed it? A. I signed it.

Q. Those are your signatures?

A. I refused to sign it at first, but he said I have to sign, but I didn't do that after he let me see it. Then he went out and they have a conversation with Mr. Seth and the rest of the detectives outside. So when he came [56] back, he say, "I

(Testimony of Albert Gonzales.)

want you to read that aloud," he said. That is what he told me.

Q. Why were you reading it aloud?

A. I have to, sir, because he told me to read it. I have to obey him.

Q. Then they told you they had a wire recorder?

A. No, sir, no, sir.

Q. Not at that time? A. No, sir.

The Court: Did he sign this one?

Mr. Etter: Yes, they told him to sign this one and read it.

Q. It was after you signed it, you read it aloud, you say they brought the other detectives in?

A. No, sir, no, they took me up to see them. Then Mr. Sprinkle let me read that aloud.

Q. I see.

A. He had me read it very loud, sir.

Mr. Etter: Move at this time for the admission of Petitioners' Exhibit 1 for identification into evidence, your Honor.

The Court: It will be admitted.

(Whereupon, the document above referred to was admitted in evidence as Petitioners' Exhibit No. 1.) [57]

Mr. Etter: Q. Had you asked for a lawyer before you signed that one, too?

A. Yes, sir, both of them.

Q. And were you in this Seattle Police Headquarters during Saturday morning?

A. Sir?

(Testimony of Albert Gonzales.)

Q. You were there all Saturday morning, were you not? A. Yes, sir.

Q. At any time after your arrest, did any policeman take you up in front of the judge like that judge here and ask you what your name was?

A. No, sir.

Q. And tell you you were charged with any crime? A. No, sir.

Q. Or advise that you had a right to counsel?

A. No.

Q. Or advise about your rights with regard to making any statement that would incriminate you or anything like that? A. No, sir.

Q. Or was a bond set on you in any of that time? A. No, sir.

Q. You were just kept there, is that it?

A. Yes, sir.

Q. Were you kept there all day Sunday, the following day? [58] A. Yes, sir.

Q. After this was signed? A. Yes, sir.

Q. And Monday of the following day?

A. Yes, sir.

Q. Were you allowed to see a lawyer on Sunday or Monday?

A. Well, they left me up there. After a couple of hours up there, I signed the second one, Mr. Seth let me call up my friend. He wouldn't let me call up a lawyer.

Q. He let you call a friend?

A. Yes, sir.

(Testimony of Albert Gonzales.)

Q. But you didn't see a lawyer or anybody on Monday or Sunday?

A. Well, I let my friend get in touch with the lawyer there.

Q. That was when? Monday?

A. I don't recall any more what day because my mind is so empty that time.

Q. When did they take you over to the County-City Building where they have the county jail?

A. I think that was about Tuesday in the morning, sir.

Q. Tuesday? A. Yes, sir.

Q. Was that the day they filed an information against you and charged you with murder?

A. Yes, sir, yes. [59]

Q. And were you taken up before a judge that day?

A. Yes, sir. I think so, sir. I don't recall—at any rate, I know that they took us over there.

Q. And you had never seen a judge until that time? A. No, I don't recall, sir.

Q. Or a lawyer?

A. Well, I have seen a lawyer. He came down there, I think that was—I don't recall, I think that was around Monday morning, sir.

Q. Monday morning. But during Saturday and before the statement was signed——

A. No, they wouldn't let me, sir.

Q. Never saw anybody? A. No, sir.

Q. And were you afraid of these policemen?

A. Well, I was afraid of them, sir, because that

(Testimony of Albert Gonzales.)

is why I intended to be peaceful, because I never——

Q. You were in fear of bodily harm?

A. Yes, sir. I always afraid of them, sir.

Q. And is that why you gave these statements?

A. Well, if I don't give it to them, sir, they are going to beat me.

Q. I know, but that is why you gave it, is that it?

A. I have to, sir.

Q. Would you have given the statement otherwise if you hadn't [60] been beaten?

A. No, that is why I refused to give it and asked for my lawyer, sir, but since they beat me up, I cannot stand any more.

Q. I see. No appeal was taken in your case?

A. I think we asked, sir, but they didn't go through with it, I guess, sir.

Q. Didn't go through with it?

A. Yes, sir.

Q. Did you have a lawyer appointed for you, or did you hire a lawyer?

A. We hired one, sir.

Q. You hired one?

A. By my friend, my friend hired one.

Q. But there was never any appeal in your case?

A. I don't remember. I think we have appealed, sir.

Q. You filed a notice, but it was never appealed?

A. They never come through.

Q. You thought it was, is that it?

A. Yes, sir.

(Testimony of Albert Gonzales.)

Mr. Etter: At this time I would like to move for admission into evidence of Petitioners' Exhibit 2 for identification.

The Court: It will be admitted. [61]

(Whereupon, the document previously referred to was admitted in evidence as Petitioners' Exhibit No. 2.)

Mr. Etter: That is all, Mr. Gonzales. You remain there.

The Court: Yes, you may cross examine.

Cross Examination

Q. (By Mr. Dimmick): I just have a couple of questions, Mr. Gonzales. A. Yes, sir.

Q. Now you had a trial before a jury, is that right? A. Yes, sir.

Q. And you had two lawyers representing the three of you? A. I have——

Q. There were two lawyers representing all three of you together? A. Yes, sir.

Q. Your lawyer was named Freeland?

A. Freeland, yes, sir.

Q. Did you have an opportunity or did you take the stand in your own defense at the trial?

A. I don't get you, sir?

Q. Did you have an opportunity to or did you take the stand in your own defense at the trial of this matter for which you have been sent to prison?

A. No, they put me in the stand, sir. [62]

Q. That is what I say, you testified at the trial?

A. Yes, yes, sir.

(Testimony of Albert Gonzales.)

Q. Well, did you tell the Court all about these things that you are telling us now?

A. Well, there is lots of these things—these things we are not allowed.

Q. There was no one in the courtroom who was intimidating you or beating you or in any way molesting you, was there, in connection with anything you said? A. No, sir, no, sir.

Q. You had an opportunity to say anything that you wanted to say in your own defense?

A. Well, I was not allowed to say something, sir, just only the question and answer.

Q. Yes, but you had your counsel who was prompting you as to what to say or not to say by way of questions and answers? A. Yes, sir.

Mr. Dimmick: No further questions.

Mr. Etter: Is that all?

Mr. Dimmick: Yes.

Mr. Etter: That is all.

The Court: As I understand it, you didn't tell what you have told here about this beating at the trial? I say, at the trial, did you testify about the policemen beating [63] you?

A. Some part of it, your Honor, because I was not allowed. I mean, the prosecutor, he just asked me a question, I just answer according to the question, because they cut me off all the time. I tried to put some of those things, but they cut me off.

The Court: Yes, all right.

(Witness excused.)

Mr. Etter: Now there are two other petitioners, but I don't those two can add anything to the testimony here, your Honor. Their affidavits are there and I have them here for questioning on those affidavits if Mr. Dimmick wishes to pursue the matter.

The Court: Any cross examination on that?

Mr. Dimmick: No.

The Court: I haven't had an opportunity to read this second statement here, your Petitioners' Exhibit 2. What does he say in here?

Mr. Etter: He states there that he, and eventually he and Mr. Coluya and Mr. Giron with Mr. Giron driving a car, went out to Renton. After they got there, this fellow Molinda came along in his car and there was a shooting battle out there and Molinda was shot or something and he ran or somebody else ran. That was the story. That is, substantially, [64] he implicates both the other men in it, who, up until that time, hadn't been involved.

The Court: Is that all the evidence that you have to present then, Mr. Etter?

Mr. Etter: That is correct, your Honor.

The Court: Do you have any evidence, Mr. Dimmick?

Mr. Dimmick: Well, your Honor, I don't know whether these have been filed in this matter or not, but I have the warrant of commitment to the penitentiary, I have the judgment and sentence and the information against these three men, and I don't know whether they are a part of the file at this time.

The Court: I think perhaps you better present them.

Mr. Dimmick: If not, I would like to present them. They are photostats, the same as counsel presented.

The Clerk: I have marked Respondent's Exhibits 3, 4, 5 and 6 for identification.

Mr. Dimmick: I would like to ask that these be admitted.

The Court: Have you seen these?

Mr. Etter: Yes, your Honor. I think it was the ordinary warrant and commitment and sentence.

The Court: You have no objection to them?

Mr. Etter: No, I have no objection to their admission. [65]

The Court: They will be admitted, then.

(Whereupon, the documents above referred to were admitted in evidence as Respondent's Exhibits Nos. 3, 4, 5 and 6.)

The Court: This, I think, illustrates the disadvantage of trying these cases. I think Mr. Etter came into this case after it started and then, of course, Mr. Dimmick has come into it only recently. I have just looked over the petition here hurriedly, but I have it summarized, and I don't believe it set out this particular ground of use of involuntary confession, did it?

Mr. Etter: No, they didn't elaborate on it, but, as I pointed out to your Honor in this one statement, "The King County officials have used coercion and duress against your petitioner, all against the Constitution of the United States."

The Court: Where is that?

Mr. Etter: Paragraph VI, the last line of paragraph VI. I asked your Honor if I should elaborate on that in a new petition.

The Court: I missed that, I didn't know that was in there.

Mr. Etter: By appropriate affidavits, specifying what the duress and coercion were. [66]

The Court: Yes, and the affidavits were served here on the 3rd of February, I believe; isn't that right, Mr. Dimmick?

Mr. Etter: They were served on the 29th, but Mr. Dimmick explained to me about the switchover in the office over there.

Mr. Dimmick: Yes, Mr. Naccarato left the office on the 31st, your Honor.

Mr. Etter: I served them a week ahead of time, but I can understand what happened over there.

The Court: Yes, I can understand very well the disadvantage under which Mr. Dimmick is working here.

I might say that this appears to me to be one of those cases which don't come very often, that is, it is rather an unusual situation where there is a real factual issue on a question, the resolution of which in favor of the petitioner would warrant the granting of the writ.

Now, as I understand it from the decisions of the United States Supreme Court, there can be no question but what the use of a confession that is extracted by force and threats and violence, as this one was, an involuntary confession, a forced con-

fession is used in the trial in which a defendant is convicted, the courts will not go into the question of whether he might have been convicted by the jury from other evidence; the use of the forced confession taints the [67] conviction and renders it invalid. It is a violation of a man's Constitutional rights under the 14th Amendment.

But certainly we can say here that here is a proceeding and police methods and methods of prosecution that shock the conscience and we can say are manifestly unfair and un-American and they violate the due process. I think that if this man is telling the truth, if I should say that I believe what he says—and it is uncontradicted so far—he would be entitled to release on habeas corpus, and that is just my tentative view of it.

I don't believe that I am precluded because he was represented by counsel and the same question was raised or may have been raised in his state court trial, because the Federal Courts on a question of this kind resolve the question for themselves, the factual question, and are not bound by the decision of the state courts. I think I am right about that.

Mr. Etter: That is correct. Ashcraft vs. Tennessee sets that out: they are not bound by a jury or a court. In fact, they are supposed to make their independent investigation.

The Court: Of course, there would be more reason for taking that attitude where there has been no appeal to the Supreme Court of the state, and there wasn't in this case, as I understand it.

Mr. Dimmick: Your Honor, if I may make a little argument here.

The Court: Yes. I was just stating my tentative views here in order to shorten the argument.

Mr. Dimmick: That's fine.

Well, we have here three men who have a counsel. I don't know if what the man says is true or not. I presume that it isn't true. But they had counsel, were represented, and it is the type of thing, I would assume, that is peculiarly within the province of the triers of the facts and of the law to determine whether or not a man is telling the truth and, of course, it is up to counsel to see that he is given an opportunity to tell the truth, and I just assume, without having read the transcript or anything, that they were given that opportunity.

Now it is alleged in one of the affidavits, if your Honor will note, that these three men had something like $8,500 with which to handle this matter. Apparently they deeded some property to one of the attorneys and there was an appeal made from the Superior Court of King County. The records, the certified copy of judgment and sentence and notice of appeal were mailed to the Clerk of the Supreme Court on May 3rd of 1950, and then following that nothing was done. Then on September 8th, the appeal was dismissed.

These men have had the writ of habeas corpus in [69] our local courts, the Superior Court to the Supreme Court of the State of Washington, to the Supreme Court of the United States on certiorari, all of which have been denied.

The Court: I think I am familiar with the procedure, however, on writ of habeas corpus in the Supreme Court of the State of Washington, and there is no hearing on fact issues. These men never leave the penitentiary when their hearing is had in Olympia. The Supreme Court looks at the petition and looks at something else, I don't know what, but if a fact issue of this kind is raised, they have no opportunity to testify, they have no opportunity to support the allegations of their petition, they are just denied without any hearing, so that that doesn't carry much weight with me, legally or otherwise.

Mr. Dimmick: Well, I assume that the state will get some opportunity to present evidence.

The Court: I was just getting to that.

Mr. Dimmick: Some affidavits.

The Court: I was just coming to that, the reason that I was stating my tentative views here.

I think that if a confession is beaten out of a man and it is used to convict in the state court, that he has a right to appeal to the Federal Court, after exhausting his state remedies, for relief for violation of his Constitutional rights, and the fact that he was represented by [70] counsel in the state court trial, or even that the question of the admissibility of the confession is raised and passed upon there, is not, as I understand it, binding on the Federal Court, it is my duty to re-examine it.

Here, it seems to me, that there should be something, we should hear from the policemen, in other words, if they deny this, and of course every case

has to stand upon its own merits. But we don't have to have the Wickersham Report to know that in some instances brutality of this type is used by the Seattle Police Department. It has been brought out in my Court and I would be rather ignorant of the ways of the world if I didn't know that in my position, that the Seattle Police Department does use these brutal methods.

Mr. Etter: I just have this last week in the headline——

The Court: That is the reason I don't brush these things off; I think they should be given consideration; and if these policemen don't see fit to deny this, I think I will have to grant this writ.

Now I will give the state an opportunity to contravert this, of course.

Mr. Etter: That is correct, they may contravert it.

The Court: And another thing, just thinking aloud, this confession, if it was used, improperly extorted and was involuntary and was used against Gonzales, it would be in [71] violation of his Constitutional rights and it wouldn't be admissible against the other defendants. If it is admitted, the court should have instructed the jury not to consider it as evidence against those who did not make the confession, even though their names are mentioned in there and they are implicated.

Now I wouldn't think that this would taint the conviction of the others, unless it was admitted as evidence against all of them, and it seems to me that in the absence of some affirmative showing,

I would have to assume that the state court properly applied the rules of evidence. That would be my thought on that feature of it.

Now I think that what we should do is to continue this over until the next hearing, along with those others you mentioned here, and the state will be given an opportunity to meet this evidence.

I might say, Mr. Dimmick, if you use affidavits, I think they should be served upon Mr. Etter in time so that he can submit interrogatories to the policemen, if he cares to do so, or perhaps take steps to take their depositions.

Mr. Etter: That's right.

The Court: Because I doubt if you will bring them all the way across here in person, will you?

Mr. Dimmick: Well, it only takes six hours to get over here. [72]

The Court: Well, I think it would be preferable to have them here because it is always better to have a witness in person. It is hard to judge the credibility of a witness by an affidavit.

Mr. Dimmick: I see what you mean. The main argument is against Sprinkle and Seth?

Mr. Etter: Sprinkle and Seth, Thomas and Ryan, and four or five of them.

Another thing I think your Honor has in mind, but I think Mr. Dimmick should probably be advised, there is a question on the matter of validity of the statements here and there is a question that certainly is going to be argued, as far as I am concerned, that if, as a matter of fact, everything was patty cake down in the police station in the City

of Seattle, the question has to be answered, I think, in this proceeding why it was that this man was held down there right in the Seattle jail when there is a magistrate right upstairs available in that police court in Seattle. I mean, if there was no coercion, everybody was happy, there is a question here in my mind whether there was a reasonable time under the Washington statute to take him before a magistrate. Why wasn't he taken? That is a mandatory part of our Washington statute. I think that is a matter that is to be considered, too.

The Court: I want it clearly understood, Mr. Dimmick, [73] that whatever may or may not be the methods used by the Police Department of Seattle, which I do not approve, I don't in any way hold you responsible for it.

Mr. Dimmick: Well, your Honor, I am not going to uphold their methods if, in fact, they are as were suggested.

The Court: In this case, we are finding out what they did in this case.

Well, this case will be continued then until the next habeas corpus hearing day, which will probably be early in May sometime and I will give you notice of it. But you can go right ahead with your exchange of affidavits here and other matters in this case. If you are going to bring the men over here personally, of course, then we can just have the hearing at that time.

Mr. Dimmick: I will contact the Seattle Police Department and those that I can bring, I will bring,

and those that I can't bring, we will make arrangements for affidavits.

The Court: Yes, you might use affidavits on part of them and bring the others over.

Mr. Etter: Fine.

(Whereupon, the hearing in the above case was adjourned until the next habeas corpus hearing day in Walla Walla, Washington, of the Court.) [74]

Walla Walla,Wash., July 14, 1953, 8:30 o'clock a.m.

(The hearing in the instant cause was resumed pursuant to adjournment of February 5, 1953, the same parties being present as before, and the following proceedings were had, to-wit:)

The Court: In the matter of the application of William Giron, Gonzales and Coluya against Cranor, you have a copy of the return and answer, Mr. Etter?

Mr. Etter: Yes, I have seen a copy of it.

The Court: All right, you may proceed.

Mr. Etter: I gather, your Honor, that the return and the answer is a general denial of the allegations of the petition filed by the petitioners, and I also assume that the return and the answer is a denial of the matters set forth in the affidavits of the three petitioners supporting the petition which alleged the subsequent claims of the petitioners in regard to their deprivation of rights guaranteed to them by the Federal Constitution. I further assume that

the answer is merely an allegation that the commitment and judgment and sentence are valid and, I might say, a re-allegation of the affirmative defense that the present petition and the affidavits in support there are in the nature of a collateral attack on the judgment. [75]

Of course, on the motion to dismiss, that was before your Honor and your Honor held that it is not a collateral attack.

Mr. Dimmick: As far as the motion to dismiss is concerned, I am disregarding that for the purposes of this hearing.

Mr. Etter: So I assume that it is just a restatement of the grounds there, and that it is the position of the respondent that the general denial of the petition, of the allegations and the subsequent matters set forth in the affidavit, that it now becomes the duty of the respondent, in view of the showing made here at the previous hearing, to show support, in testimony or otherwise, of its general denial of those allegations which are set forth in the affidavit.

Of course, to review that very briefly, your Honor has merely to refer to the affidavit of Albert Gonzales in which he alleges the facts, circumstances and happenings prior to the time of the elicited confessions, of which there were two, one made at one particular time following the arrest, the other made sometime subsequent during a questioning period, as alleged in the affidavit, of some 24 or 26 hours, in which there are allegations of assault and threatened assault, coercion and fear inducing the

statements which were made by the petitioner and which the petitioners [76] claim are in the nature of a confession and, therefore, untrustworthy and not to be considered by the Federal Court in reviewing the matter at this time.

Now the subsequent allegations upon the testimony of Mr. Gonzales were almost identical with those alleged in his affidavit, so it appears to me it now becomes the duty of the state to show facts and circumstances supporting their denial of those.

The Court: Yes, this really is a continued hearing here. As I recall, testimony was put on by the petitioners at the prior hearing and the matter was continued over to give the state an opportunity to present its defense.

Mr. Dimmick: That is correct.

The Court: So you may proceed when you are ready.

Mr. Dimmick: Well, your Honor, I take it then from what Mr. Etter says that the other two people over here, Coluya and Giron, their entire claim for release is based solely on Gonzales' evidence. Do I understand that right, because they didn't take the stand in the prior proceedings?

Mr. Etter: Of course, counsel doesn't have to assume that position. The position that we take on the showing that has been made, and I think the Court is well aware of it, that the matter of an induced, involuntary, untrustworthy confession is of no more import or of no more value against joint defendants in the same trial than it is against the [77] individual from whom they secured it.

This isn't a case that involved separate trials; this is a joint case of three defendants.

The cases are uniform—I cited one last time—it is the rule that an involuntary confession is no better against these two men than it is against the man who gave it.

The Court: May I suggest, gentlemen, you defer argument until after we have all the testimony?

Mr. Dimmick: Am I at liberty to have Mr. Gonzales take the stand for cross examination at this time?

The Court: I see no objection to that. He was on before, you may put him on again if you wish.

ALBERT GONZALES

a petitioner herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Cross Examination

Q. (By Mr. Dimmick): Your name is——?

A. Albert Gonzales.

Q. Albert Gonzales? A. Yes, sir.

Q. Now I don't recall your testimony in the first proceedings too well, but basically you alleged that certain police officers in the Seattle Police Department abused you and threatened you and, if I understand correctly, they actually used physical force? A. Yes, sir.

Q. Which one of these fellows here did that, Mr. Gonzales? A. He is not here now.

Q. He is not here now? A. No.

(Testimony of Albert Gonzales.)

Q. Neither one of these men (indicating) beat you up in any way? [79] A. No, sir.

Q. This fellow (indicating), do you know his name now? A. He just Sergeant Seth.

Q. Sergeant Seth?

The Court: I didn't get that?

A. Sergeant Seth, your Honor.

The Court: Sergeant what?

A. Seth.

Mr. Dimmick: Sergeant Seth, S-e-t-h.

The Court: How do you spell that?

Mr. Dimmick: S-e-t-h.

A. S-e-t-h.

Q. Who was it that abused and threatened you?

A. Well, at first, Mr. Dimmick, I don't know his name. Later, my attorney told me his name—Thomas.

The Court: Thomas?

A. Thomas.

Q. (By Mr. Dimmick): Thomas is the man that abused you and threatened you?

A. No, he beat me up.

Q. He beat you up? A. Yes, sir.

Q. And when was this? What time was this after you were arrested?

A. Well, as soon as I arrived in the station there, about [80] probably five minutes later.

Q. Five minutes later? A. Yes, sir.

Q. That was Thomas? A. Thomas.

Q. Did that——

(Testimony of Albert Gonzales.)

The Court: It was about 1:30 in the morning when you were brought in?

A. I don't know exactly.

The Court: It was after midnight?

A. Yes, sir.

Q. Now you told your attorney about having been beat up, didn't you?

A. Yes, sir, I did.

Q. And didn't you, or did you, I should say, did you, as a result of having relayed this information to your attorney, have an examination by a doctor?

A. No, sir.

Q. You never had any examination by a doctor?

A. No, sir, because when I was—when I was beaten up, I was taken to they call Sergeant Ryan, because they introduced him to me, himself, at that time.

Q. Now this confession—you signed two confessions? A. Yes, sir.

Q. And the first one, I should say, you didn't sign two [81] confessions. The first one that you signed was signed what, about 12 hours after your incarceration?

A. I don't recall the hours there, sir.

Mr. Etter: I might say they are in the exhibits there, the time on them, both the statements.

Mr. Dimmick: Yes. Where are they?

The Court: They are in the file here.

The Clerk: Petitioners' 1 and 2.

Q. (By Mr. Dimmick): Now, showing you what

(Testimony of Albert Gonzales.)

has been marked as Petitioners' Exhibit No. 1, that is the first statement that you signed?

A. Yes, this is the one.

Q. And that was signed, is that correct, there it says at 5 a.m.; that was to say it was taken at 5 a.m., January 7th?

A. Well, I don't recall the hour, sir.

Q. Well, what is that, four, five hours after your arrest?

A. Well, I was not paying attention to the hours any more, sir, because I was down there being questioned.

The Court: You will have to speak up a little louder.

A. I don't recall exactly the time, your Honor.

Q. (By Mr. Dimmick): What time was it that you were arrested, do you remember that?

A. No, I don't recall, sir. They just put me up to the station, is all. [82]

Q. Now, then, just to get things straightened out, this confession here, this instrument here which is marked Petitioners' Exhibit No. 2, will you identify that?

A. That is the same of Sergeant Seth, yes, sir.

Q. What is it, Gonzales?

A. What do you mean, sir?

Q. What is it, what does it purport to be? Do you know? A. Very hard to recall, sir.

Q. Well, is it the second confession or the second statement?

(Testimony of Albert Gonzales.)

A. Well, second confession, too, sir, because it is signed by Sergeant Seth.

Q. Whose signature is that right there (indicating)? A. That is my signature, sir.

Q. Well, now, then, is this the second statement of the confession that you signed?

A. Yes, sir, yes, sir.

Q. Okay. You have stated in your affidavit that you were arrested at 1:30 a.m. in the morning of Saturday, January 7, 1950? A. Well——

Q. That is, I take it, fairly accurate?

A. Well, that is the Sergeant that wrote that, sir. I don't know exactly the hour.

Q. Well, now, this affidavit here, I take it that you wrote [83] that, Mr. Gonzales?

Mr. Etter: Maybe it would be a good idea to let him examine it.

Mr. Dimmick: Yes.

Q. Well, this thing is the affidavit that you wrote in support of your petition for writ of habeas corpus, Albert. A. 1:30? 1:30, yes.

Q. Does that refresh your memory in good shape? A. Yes, sir, that's right.

Q. Then the first paper that you signed was signed at approximately five or thereafter the same morning that you were picked up, we'll say four hours, you signed the first statement?

A. I think so, sir.

The Court: What is the hour on the first statement?

Mr. Dimmick: About 5 a.m., your Honor.

(Testimony of Albert Gonzales.)

The Court: Oh, all right.

Mr. Dimmick: Approximately four hours.

The Court: I see, all right.

Q. (By Mr. Dimmick): Now, then, you were picked up and at approximately five minutes after you were brought down to the jail, this man Thomas beat you up, and was he the only person in the station at that time who abused you or made any threats toward you to get you to sign this first statement at five o'clock? [84]

A. There was a Sergeant Ryan there.

Q. Sergeant Ryan?

A. He was the one to let me sign it, sir, because the Detective Thomas didn't stay long, he beat me up and he went back to his friend and came back and——

Q. Thomas, after he beat you up, he left?

A. He left and came back, sir.

Q. He left. How long was he gone, do you recall?

A. Well, he went out and next door about two, three minutes, I guess, and came back, and that is the time when he threatened me. He said, "God damn it," he said, "if I see you on the sidewalk, I'm going to kick hell out of you."

Q. Now this fellow Thomas, you say, was he there during the time that Sergeant Ryan or Ryan was beating you up?

The Court: He said Thomas beat him up.

Q. (By Mr. Dimmick): Thomas was the one that was beating you up? I don't want to get you

(Testimony of Albert Gonzales.)

confused here. I'm getting confused. Thomas is the one that beat you up, and he left, and then you said a Sergeant Ryan came in?

A. No, Sergeant Ryan was sitting in the chair, sir, because I was talking to him. He was questioning me about——

Q. Well, Sergeant Ryan was there during the time that Thomas was beating you up?

A. Yes, sir. [85]

Q. Was he assisting him in any way?

A. No, sir, he was sitting down there when Thomas beating me up, and then I heard a word come from Sergeant Ryan, he said, "That is enough."

Q. Yes?

A. I said—well, I heard that, that is very clear in my ears. And then Thomas give me a couple of beatings again, just a couple of blows, then he left.

The Court: You say Sergeant Ryan was sitting there while Thomas was doing that?

A. Yes, sir. He told him, he say, "That is enough."

Q. (By Mr. Dimmick): Now while Thomas was absent, what did Ryan say to you, if anything?

A. Sir?

Q. I said, while Thomas was absent from the room, what, if anything, did Sergeant Ryan say to you?

A. Well, I was—then I, as soon as the beating. I just lean a little bit in the corner.

Q. Pardon?

(Testimony of Albert Gonzales.)

A. I lean a little bit in the corner, sir, because I was out of breath.

Q. Yes?

A. I say, well—and then he said, Ryan said, Detective Ryan said, "Come in here." So I sit down. He said, "You should have tell something at first, then you don't have [86] that kind of beating."

Q. All right. Now this happened, as you said, five minutes after you were brought down to the police station. Now we have accounted for roughly five minutes of about four hours. Now would you tell us what happened between the time that you were beat up and the time that you signed this confession, signed this first statement, at five o'clock?

A. Well, after the beating and after the signing of the confession——

Q. No, no, I want to get up to the signing of the confession, Gonzales. Let's get after the beating, let's take this period between the beating and the time you signed the first piece of paper, the first statement?

A. As I recall, sir, after the beating and I was talking to Sergeant Ryan, then he wanted me to tell something about the shooting, so I mentioned about Fidel threatening my life.

Q. Fidel threatening his life?

Mr. Dimmick: The deceased.

The Court: Oh, yes.

A. And then I mentioned about—I mentioned about we was trying—I was trying to have a meeting with Fidel, and, well, he said something that

(Testimony of Albert Gonzales.)

he don't like to hear about the meeting with Fidel, he want me to forget those words. [87]

Then I asked him if I could call up a lawyer, and then after awhile, he think it over, "Who is your lawyer?" So I told him it is Mr. Patrice.

Q. Who? A. Patrice.

The Court: I don't think the witness understood counsel's question. What he asked you was what you did all this four hours that he says elapsed from the time you came in until you signed the first paper. What happened all that time? You don't have to say everything you said or everything anybody said; just tell what happened, in a general way, during that four hours. That is your question, isn't it?

Mr. Dimmick: Yes.

Q. Let me put it this way, Albert, so you can answer it more quickly: Were you threatened or abused or beat up any more during the period of some three hours and fifty minutes after the first beating before you signed the first paper?

A. You mean in that little time, sir?

Q. Yes?

A. Well, when I was talking to Sergeat Ryan after my confession and I see if I could call up a lawyer, well, I heard him make a little remark about an attorney or something——

Q. Speak up a little louder. [88]

A. I have a little sore throat, sir.

Q. All right.

A. I asked him if I could call up my attorney,

(Testimony of Albert Gonzales.)

sir, and so he said something about the remark, about the attorney I engaged during the shooting of my brother. So I didn't pay any attention then because I was kind of scared.

Q. Well, now, let's get back to the original question, if we can: During the remaining period and before you signed the first paper——

A. Yes, sir.

Q. ——were you again beaten or threatened or abused? A. No, not exactly, sir.

Q. Not exactly. Well, let me ask you this: Was there any force at five o'clock to prompt you or to force you to sign this paper?

A. Yes, Sergeant Ryan just told me to sign it, sir, and I cannot say no.

Q. You say he told you to sign; is that all he said, just sign this?

A. He stated first——

Q. Pardon?

A. I hesitated at first, but I might as well sign it, so I have to sign it, I cannot argue with officers.

Q. Did he hit you or threaten you in any way?

A. Well, of course, the sound of his voice, sir, I am afraid [89] of that, see.

Q. You are afraid of the sound of his voice?

A. So I had to do it, I had to sign it.

Q. Do you recognize either of these two men sitting in the back of the room, Albert?

A. Well, that detective, I can't recall exactly, sir.

Q. This one here (indicating)?

(Testimony of Albert Gonzales.)

A. Yes, sir.

Q. You don't know who he is. Was he present at any time during this thing you are talking about, this beating up and all?

A. Well, I can't recall exactly the face, but I only remember the names.

Q. You don't recall his face, you just remember the names of the people?

A. The names.

Q. What about the fellow back there without any hair, do you recognize him?

A. Yes, sir.

Q. Who is that?

A. That is Detective Thomas.

Q. That is Detective Thomas, and he is the man that beat you up? A. Yes, sir.

Q. Now, Albert, after you signed this statement at five [90] o'clock, what happened to you then?

A. They took me—they took me to a car, sir, downstairs.

Q. Who took you to a car?

A. Two detectives.

Q. Took you to a car?

A. Yes, sir, downstairs.

Q. Yes?

A. And the other that went down there in the front seat, detective, I forget their names, sir, and the other detective sitting with me in the back with a handcuff in my back, and he got the gun down in my ear here, behind my ear (indicating).

Q. This is all after you had signed this?

(Testimony of Albert Gonzales.)

A. Yes, sir. So he said—I was trying to ask him where are they going to take me, but I was afraid, sir, because he said, "If you move, I'm going to shoot your head off."

Q. Let's just stop there for a minute now. Were any of the men involved in the previous questioning of yours, were they in the car?

A. No, no, sir.

Q. None of these men here?

A. No, sir.

Q. They turned you over to a new group, is that it?

A. Not exactly turned, sir, they just picked me up.

The Court: I can't hear that. Wait until this truck gets [91] by. All right.

Mr. Dimmick: Q. What I said was, Mr. Gonzales—— A. Yes, sir.

The Court: You are talking so that I can hear, Mr. Etter can hear, not just to this man. Don't just talk to him; speak so we can all hear you.

Mr. Etter: Step back a little, counsel, maybe he will talk up.

The Court: Yes.

Mr. Dimmick: Okay.

Q. You say that the group of men who questioned you and forced this thing out of you here, they left you and you were taken by a new group of men in this car?

A. No, that is not a group. You mean a group of detectives, sir?

(Testimony of Albert Gonzales.)

Q. Yes.

A. There is no group of detectives.

Q. You said there were three or four.

A. It is not a group of detectives, sir, because Detective Thomas and Sergeant Ryan, he called himself down there, is the only one down there, sir.

Q. Yes?

A. But after the confession, there is a couple of detectives just came in and say, "We are going to take him in."

Q. That is what I say—— [92]

The Court: He says there wasn't any new group; that only Ryan had him sign this; isn't that right?

A. Yes.

The Court: Sergeant Ryan.

A. Sergeant Ryan.

Mr. Dimmick: Q. I say now after you signed this, then, some new men—— A. Yes.

Q. ——came and took you away in a car?

A. Yes, sir.

Q. Where did they take you?

A. They took me to a house, sir.

Q. Do you recall where this house was?

A. Yes, Mr. Giron's house, sir.

Q. Mr. Giron's house?

A. Yes, sir. I was afraid at first because I thought they were still going to take me for a ride or something. I didn't know anything about it.

Q. Yes?

A. They didn't even question me when we arrived down there.

(Testimony of Albert Gonzales.)

Q. This was, then, we'll say that when you went for this ride with these other officers, this was sometime after five o'clock in the morning?

A. Well, I don't recall the time, sir.

Q. Was it immediately after you signed this?

A. Yes, sir.

Q. It was. And then how long were you gone from the police station?

A. Well, I don't recall exactly, sir. I think it is around half an hour.

Q. Then they brought you back?

A. Yes, sir.

Q. And they put you back in jail?

A. In the cell, sir, yes.

Q. Then we have another confession here?

A. Yes, sir.

Q. Another piece of paper you signed. Now you stated here that this thing was signed on January 8, 1950, at approximately 12:30 a.m. I think that is the date. That is when the questioning started and it was signed at approximately 2:10 a.m.?

A. Yes.

Q. Now, then, you started giving this statement, at least according to the statement itself that you signed, at approximately 12:30 a.m. on January 8th. That is approximately—well, that is 24 hours from the time you were picked up, roughly?

A. I don't exactly recall the time in there any more, sir.

Q. I mean it is on here, Albert, and you signed this?

(Testimony of Albert Gonzales.)

A. I don't recall the time any more because I was so hungry, [94] I didn't have anything to eat all day and night, I didn't sleep at all, and my mind is so blanked out and everything like that.

Q. All right. Well, about 24 hours, then, after you were picked up, then you began giving the Seattle Police Department this second statement. Now, then, to whom did you give this statement, do you remember?

A. To Sergeant Sprinkle, Detective Sprinkle, I guess, sir, yes.

Q. What about Seth here?

A. Well, Sergeant Seth, they wanted me to tell the story when they brought me up, sir.

Q. Yes?

A. I think it is more clearer, that way.

Q. Let's start with the time——

The Court: What was the first name he mentioned?

Mr. Dimmick: Sprinkle, your Honor.

The Court: A police sergeant, is he?

Mr. Dimmick: Yes.

The Court: Or police officer?

A. Officer.

The Court: Policeman, all right.

A. Detective.

Mr. Dimmick: He is a detective, your Honor.

The Court: I see, all right. [95]

Mr. Dimmick: Q. All right, go ahead, Albert.

A. Before Sergeant Seth brought me up——

Q. That is this man here (indicating)?

(Testimony of Albert Gonzales.)

A. Yes, sir. There was a couple more detectives that brought me up, but I don't recall exactly their names. They just wanted me to make another statement, but I refused. So then when I don't give in, they put me down—they put me in the cell again. I don't recall exactly the times and that any more. Sergeant Seth came over there and brought me upstairs.

Q. Sergeant Seth took you out of your cell and took you upstairs?

A. Yes, sir. Well, Sergeant Seth, I complained to Sergeant Seth about the beating. He know something about it, too, because he said that.

Q. What did he say, do you recall?

A. Well, when I complained to Sergeant Seth about the beating, he said, "Well, we don't do that," he said. I contended then that Sergeant Seth——

Q. Just a minute. Okay.

A. I thought at first then that maybe Sergeant Seth would do that, but the rest might do it.

The Court: We may have to put this over until the pea harvest is finished.

Q. (By Mr. Dimmick): Okay, go ahead, Albert. [96]

A. So then Sergeant Seth told me that—then he introduced me—his name—I don't know Sergeant Seth before, I don't know any detective at all, and then he introduced to me and Detective Sprinkle came around and he introduced me, this and that. And then Detective Sprinkle went out

(Testimony of Albert Gonzales.)

and Sergeant Seth sat down, he let me sit down there, and he said, "Well, I know—" he said, "I know your brother," he said. Then he——

Q. Now up to the present time, you hadn't confessed to anything, had you Albert? Up to that time, you hadn't confessed to committing any crime at all, had you? A. No, sir.

Q. You had not confessed to committing a crime?

A. You mean all my life, sir?

Q. No, I mean in connection with the shooting of Fidel Molina, you hadn't confessed to shooting Fidel Molina at that time? A. No, sir.

Q. Not at all. All right now, then, tell me what Sergeant Seth did to force you to sign this confession here in which you admit shooting Fidel Molina and killing him?

A. When Sergeant Seth—we was talking together with Sergeant Seth and he admitted that he knows my brother and he says, "It's too bad," he says, "your brother is very nice," he been receiving the salmon from him, this and [97] that, something like that.

The Court: He received what?

A. Salmon, can of salmon.

Mr. Dimmick: Can of salmon.

A. My brother was a cannery worker down in Alaska. And he said, "Well, you might as well tell some things, what you did, and so on," he said, "and everything is all right and I'm going to help you. He says, I want to start with the beginning,"

(Testimony of Albert Gonzales.)

he says, because they have to have a beginning to start this trouble, he said.

Well, I mentioned about Fidel Molina threatening my life and I have been moving from one place to the other every week. Sometimes I move twice.

Q. Because you were afraid of Fidel Molina?

A. Yes, I am afraid, and I tried to make a meeting with Fidel so that I don't want him to bother me because I am working and I have my niece and nephew, the son of my brother, three kids, and I was helping them.

So he knows, Sergeant Seth knows the reputation of Fidel, there is no doubt of that, and then he was talking about it, and then he take a picture out from his pocket and he was showing me a picture of a Philippino body, was riddled with bullets. He picked his body up in highway in Tacoma in 1949. And then he said, "I have a suspicion of Fidel that he did this, but I don't have any proof," [98] he said. So I told Sergeant Seth, I said, "If you don't have any proof, Sergeant," I said, "you should at least have picked him up and question him so that he will not do things like that, so that I will be out of trouble myself."

Q. Go ahead.

A. And so he said—then he said, he asked me if I am going to talk, but I asked Sergeant Seth if I could call up my friend or a lawyer or the Consul, but he said, "Not this time," he said. He told me "not this time." So——

(Testimony of Albert Gonzales.)

The Court: You asked him what? If you could have a lawyer?

A. To call up my friend or a lawyer or the Consul.

The Court: He said you couldn't?

A. No, sir.

The Court: Who was that?

A. Sergeant Seth.

Q. (By Mr. Dimmick): This man——

A. He said "Not this time," he said. And then he said—I complained, I complained my inside hurting too much, and so he went out and picked up a Coca Cola. "You better drink this," he said, so I drink the Coca Cola because I was so hungry, to refresh inside of me.

Q. Well, now, let's move along a little bit here. Tell me why you signed this confession in which you admit having [99] something to do with the killing of Fidel Molina.

A. Before I make that statement, sir—well, you see, Sergeant Seth and Detective Sprinkle, they switched together all the time to question me.

Q. You mean one would leave the room?

A. That's right.

Q. Were they in there together?

A. No, one after the other, sir.

Q. They went in and out, back and forth?

A. They switched together to question me.

Q. I see. In other words, you would be sitting here and Sprinkle (indicating)——

A. No, no, Sprinkle was not here, he is outside.

(Testimony of Albert Gonzales.)

Q. He is outside? A. Yes, sir.

Q. And Seth is questioning you?

A. Yes, sir.

Q. And then Seth would leave and Sprinkle would come in and question you?

A. Yes, he go down and talk to him.

Q. That is the way the entire thing went?

A. That's right, sir.

Q. At no time were the two men together with you?

A. No, sir. Only the time when I was introduced, sir.

Q. Pardon? [100]

A. Only when Sergeant Seth introduced me.

Q. Sergeant Seth introduced you to Sergeant Sprinkle, and after that only just the two of you, you and one of the officers, were together at any time? A. That's right.

Q. Go ahead.

A. And then the one thing, I made that statement, when Detective Sprinkle, when I refused to make the statement to Detective Sprinkle, he said, "Well, you have to make a statement or I'm going to turn you over down there and get the same beating."

Q. Turn you over to——?

A. He said turn me over down there and get the same beating.

Q. Oh, okay.

A. So because I was too tired that morning, and then I was so tired that morning, and then I had

(Testimony of Albert Gonzales.)

to talk, I have to say something to ease the pressure from me so they won't put me down there. So then after that, I said to the Detective Sprinkle, I said, "What am I going to say?" I say. "Well," he said, "just tell them that you went down there and shoot Fidel." I said, "Well, that is not the point, sir. There is a beginning before we went over there. We went over to Fidel to talk to him in peace." "Well, then, sorry," he said, "just go down there and say something." There is nothing much I can do. I cannot [101] argue with officers.

Q. All right now, then, that was what forced you to sign this? A. Yes, sir.

Q. Was Sprinkle telling you that you should sign and all that and threatening you?

A. Not exactly sign it, to make the statement.

Q. To make the statement? A. Yes, sir.

Q. And then threatening to have you beat up if you didn't, is that right? Now how about Seth here?

A. Well, after that—after that——

The Court: Did he say that was Sprinkle?

Mr. Dimmick: Sprinkle, your Honor, yes.

A. Then after that, Sergeant Seth went out and Sergeant—no, Detective Sprinkle went out and Sergeant came in. He said, "Are you ready?" he said. Well, there is nothing I can do, I had to say something to ease the pressure, so I make that statement without mentioning before that how Fidel threatened me, and this and that, because they don't

(Testimony of Albert Gonzales.)

like to hear that. So I just made that just like he direct going over there.

Q. You made this statement here to Sergeant Seth?

A. No, it is not that statement, sir, it was something in there in the recording that I didn't know. That is a [102] statement that I made in front of Detective Sprinkle, because——

The Court: I didn't understand who he said. Who did you give this second one to?

Mr. Dimmick: He made this, he said, to Sergeant Sprinkle.

The Court: Oh, to Sprinkle?

A. It was Mr. Sprinkle that made that statement, sir.

Q. (By Mr. Dimmick): Seth wasn't present at that time? A. No, sir.

Q. You are sure of that?

A. No, sir, no, sir.

Q. Absolutely wasn't present?

A. I know, sir, because they always switched together. They have something, something outside. I didn't know there was a recording then, see. I think there is some hocus pocus down there outside that I didn't know anything about.

Mr. Dimmick: I have no more questions.

Mr. Etter: That is all.

(Witness excused.)

Mr. Dimmick: Sergeant Ryan. [103]

P. H. RYAN

called and sworn as a witness on behalf of the respondent, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dimmick): Would you state your name to the Court, please? A. P. H. Ryan.

Q. And you are a member of the Seattle Police Department?

A. Assigned to the Safe Detail, Seattle Police Department.

Q. Assigned to the Safe Detail?

A. Safe Detail.

Q. And what is your rank?

A. Lieutenant—well, Detective-Lieutenant.

Q. Detective-Lieutenant? A. Yes.

Q. And in January, particularly January 7th and 8th, 1950, were you a member of the Seattle Police Department? A. Yes, sir.

Q. And what was your official capacity at that time? A. Safe investigations.

Q. Safe investigations? A. Yes, sir.

Q. And what was your rank at that time?

A. Detective, same thing.

Q. Detective-Lieutenant? A. Yes. [104]

Q. Now you have been called over here to testify on this thing, and I think you heard Albert Gonzales say that Sergeant Ryan—and you are the only Ryan on the police force and you were associated with this case? A. Right.

Q. That you were present at the time when another detective, Thomas, was busily engaged in

(Testimony of P. H. Ryan.)

beating Gonzales up. You apparently said something about "That is enough"; in other words, sort of forced him to stop. Now I will ask you if you were present at an interrogation with Thomas in which Albert Gonzales was the person being interrogated?

A. Sergeant Thomas and I have been partners for seven years in the Safe Detail, and this particular evening our only contact with Albert Gonzales was, Sergeant Foster, who was in charge of the Homicide Detail that evening, or in the morning, asked you if we would bring him down from the jail. He was brought down and I believe the only question—the only words that I have ever said to Albert Gonzales is, "Come along with us." We took him down and set him in the office, and that is the last we ever seen him.

Q. That is, for both you and Thomas?

A. Yes, sir.

Q. How long altogether did you spend with Gonzales?

A. I would say probably take three to four minutes to bring [105] him down from upstairs.

Q. You have no connection with the Homicide Division at all?

A. None at all. We did assist in the investigation, of a checking of the model of the car that was used in that particular murder that night.

Q. And you spent approximately, then, two or three minutes with Gonzales, in other words, the length of time it took you to bring him from wher-

(Testimony of P. H. Ryan.)

ever he was in a cell down to the room where he was later questioned? A. Yes.

Mr. Dimmick: I don't know of any more questions.

Cross Examination

Q. (By Mr. Etter): What department, Detective Ryan, were you assigned to, did you say, at the time this man was arrested on Saturday, January 7th of 1950?

A. I was assigned to the Safe Detail for seven years.

Q. The Safe Detail? A. That's right.

Q. And you were assigned to that detail along with Officer Thomas? A. Yes, sir.

Q. And were you at the Central Police Station up there on Yesler Way, is that where you were, on this evening? [106] A. Yes, sir.

Q. How long had you been there prior to the time that the defendant or the petitioner here, Gonzales, was brought into the Central Police Station, do you remember?

A. No, I couldn't say for sure, but I would say we were in and out. We had this license number on the car that was used in the murder and we had been checking on that.

Q. You had been checking on that. You were checking on a license number of the car that had been driven or used, at least in your view of it, in this particular killing of Molina?

A. That's right.

Q. Is that correct? A. Yes.

(Testimony of P. H. Ryan.)

Q. And when had you been assigned to that particular investigation of the automobile? What time that evening?

A. Oh, I would say it could have been two, two-thirty.

Q. Two or two-thirty? A. Or later.

Q. Or later. Well, then, were you at the Central Police Station when Gonzales was brought in?

A. No, I don't believe we were.

Q. You don't believe you were?

A. My first contact with him was when Sergeant Foster asked us to bring him down from upstairs. I never seen the man [107] before in my life.

Q. All right. At two or two thirty, I assume that you and Sergeant Thomas—is that correct?

A. That's right.

Q. ——commenced your investigation to determine the ownership of the automobile that was involved?

A. Well, our hours are from eight o'clock at night until four in the morning, and we do assist the Robbery and Homicide Detail.

Q. And you did assist on this one?

A. Yes, we assisted in checking out the automobile.

Q. All right.

A. And we assisted the next night in making one arrest.

Q. You assisted the next evening in making an arrest? A. Yes.

Q. Was that the arrest of Coluya or Giron?

(Testimony of P. H. Ryan.)

A. Coluya.

Q. Coluya? A. Uh huh.

Q. Now did you have anything to do with the arrest of Giron's wife?

A. Later on in the evening, yes.

Q. Yes.

A. That was early in the morning.

Q. Early in the morning? [108]

A. Yes.

Q. So, as a matter of fact, during your investigation of this automobile, you, and the Sergeant likewise, went up and arrested Mrs. Giron at Giron's house, isn't that correct, or his apartment?

A. There was about seven officers up there that morning.

Q. About seven? A. Yes, sir.

Q. I mean you and Thomas made the arrest, did you not?

A. Well, I wouldn't say that we made the specific arrest, no.

Q. But you were there at the time of the arrest?

A. Right.

Q. Do you recall what Mrs. Giron was charged with, what crime she was charged with having committed?

A. No, I don't believe she was charged, I think she was brought in for investigation.

Q. She wasn't charged with anything, isn't that correct? A. I don't know.

Q. She was brought down to the police station and lodged in jail, is that right?

(Testimony of P. H. Ryan.)

A. I couldn't tell you that, I don't recall.

Q. Well, you saw her down there, didn't you?

A. No, I never did.

Mr. Dimmick: He has testified he doesn't know.

Mr. Etter: Cross examination, counsel.

Mr. Dimmick: Well, my goodness, we didn't raise——

The Court: What is your objection?

Mr. Dimmick: Your Honor, on our direct examination we asked him specifically whether or not there had been any connection with the charges made by Gonzales, and that is as far as we went. Now I don't object if he wants to find out if he arrested Giron's wife, but, heavens, he doesn't have to——

The Court: Well, I got the impression from the direct testimony that he had nothing to do with Homicide, that it was an entirely different department, he had nothing to do with this particular thing, and it appears now that he had quite a bit to do with it.

Go ahead.

Q. (By Mr. Etter): You and Thomas were present at the time that Giron's wife was arrested and you were assigned up there, isn't that correct?

A. Yes, we were not assigned up there; like I say, we just assisted the Robbery and Homicide on the night shift if they are short of men.

Q. You assisted and she was brought down, and then you further assisted the following day by arresting Coluya? A. The following night.

(Testimony of P. H. Ryan.)

Q. That's right. So you and Sergeant Thomas arrested, or were present at the arrest, of Mrs. Giron? You were [110] assigned to this investigation of the so-called death car and you likewise arrested Coluya, one of the three parties who had committed or had had some sort of part in the commission of the alleged murder, is that right?

A. Right.

Q. All right. When was it that you were sent up, as it were, to have this man Gonzales brought down for questioning? When was that?

A. I couldn't tell you the exact time.

Q. Do you know what time it was?

A. No, I say I couldn't tell you the exact time on it.

Q. I see. All right, how long had you been at the police station before you were requested to go up and get him on this particular time?

A. I couldn't say. I would say that we had been in and out.

Q. You had been in and out. How many times had you been in and out of the police station, say between the time you got the report on this around 1:30, or thereabouts, and the time of the signing of this first statement, which is indicated at five o'clock?

Mr. Dimmick: I object to that. I have never heard the Officer testify at any stage of the proceedings that he got a report of this at 1:30 o'clock.

The Court: Well, that may be assuming something that isn't in the testimony. [111]

(Testimony of P. H. Ryan.)

Mr. Etter: All right.

Q. You did get a report of it around two o'clock because you were assigned out to investigate the murder car?

A. I heard the call on the air earlier in the evening. We were out in the car.

Q. What time was that?

A. It was after twelve, I don't recall the exact time. That there had been a shooting in the South end. That's all we knew about.

Q. You had been investigating a so-called shooting in the South end?

A. We had not, we——

Q. Shortly after midnight?

A. We were in the opposite end of town then.

Q. You called in. Then did you go——

A. No, we did not.

Mr. Dimmick: Wait a minute. He did not call in.

A. Every car in the city can hear that call.

Q. (By Mr. Etter): That's right. After you received the call, did you call in or did you go into the police station? A. No.

Q. When did you go in?

A. Oh, I don't recall, I couldn't say the exact time.

Q. Well, was it 1:30, was it 2:00, 2:30? Give you a half [112] hour leeway.

A. Could have been either one of them.

Q. All right, assume 2:30.

A. That is assuming. I wouldn't assume because I'm not sure.

(Testimony of P. H. Ryan.)

Q. Well, have you got any idea of approximately the time within a half hour of when you were assigned to the investigation?

A. We were not assigned.

Q. The investigation of the so-called automobile involved in this murder?

A. I wouldn't say that we were actually assigned at any time.

Q. Were you assigned to investigation of the automobile?

A. Yes, we did check that out.

Q. All right, when were you first advised to do that particular job?

A. I believe that that started—the investigation on that started about three o'clock in the morning or 3:30. We had to go get a man from Mercer Island to come over and check his records out, because it was a rental automobile.

Q. Would it be fair, then, Detective Ryan, to assume that from three o'clock on, as you say, until five o'clock, you and Officer Thomas were in and out of the police [113] station on this job?

A. Yes, that is true.

Q. Beg your pardon? A. True.

Q. Now at the police station at that time, you were requested during one of these times that you came in, I assume, to bring Albert Gonzales from his cell, or wherever he was confined at the Central Police Station, into some room for questioning, is that correct?

(Testimony of P. H. Ryan.)

A. We were asked to bring him down from the jail.

Q. From the jail? A. Yes.

Q. Who made that request of you?

A. Sergeant Foster?

Q. Sergeant Foster? A. Right.

Q. Do you recall, that would have been after three o'clock, would it not?

A. I couldn't tell you the time.

Q. Well, I mean you hadn't been assigned, as I gathered, to any part of this case officially until about three o'clock?

A. We weren't assigned to any part of the case at any time; we just assisted, I would say.

Q. When you were in the jail and Sergeant Foster asked you [114] to bring Mr. Gonzales down for questioning, who else was present besides you and Officer Thomas and Sergeant Foster or whoever it was?

A. Well, there was Sergeant Foster and Thomas and myself, and I don't recall if Officers Kirschner and Waite were there present or not. I believe they were, I think they had just come in. They were the original officers on the investigation that night.

Q. Were they Homicide officers?

A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. I see. Were they assigned to this case, do you know?

A. They made the original investigation at the scene.

(Testimony of P. H. Ryan.)

Q. Beg your pardon?

A. They made the original investigation at the scene.

Q. Original investigation at the scene. Did you continue the investigation of this affair during the rest of that night on Saturday, or the rest of the morning on the 7th, and then the following Saturday?

A. Give the first part of that question again, please.

Q. Did you continue your particular investigation of the automobile that morning, that is, Saturday morning, and during Saturday, the following day? Did you and the other officer have anything to do with that? [115]

A. No, as soon as we found out about the automobile, I believe that that was about the most of the investigation.

Q. All right, when did you arrest Coluya?

A. The following night.

Q. Beg your pardon?

A. The following night.

Q. At what time?

A. I wouldn't recall the time. I believe it was late. I couldn't recall the exact time. There was about five of us went out on that.

Q. I see. In other words, were you instructed by the Homicide Detail to make the arrest, or how did that come about?

A. Well, it is just a pattern up there, if they

(Testimony of P. H. Ryan.)

need more help, anybody that is available, they just go out with them.

Q. And you were called? A. Yes, sir.

Q. All right, now, when, at three o'clock or thereabouts, I assume—you say you don't know the time that you brought this man down?

A. No, sir.

Q. Did both you and Officer Thomas go up to where he was? A. Yes.

Q. Where was he confined? [116]

A. That would be the—I forget what floor that was on. It was in the city jail, it was on the sixth or seventh floor, brought down to the third floor, the Detective Division.

Q. I see. And you both went up, did you?

A. Yes.

Q. Did you put handcuffs on him?

A. No.

Q. I see. And you brought him down where?

A. To Sergeant Foster's office.

Q. To Sergeant Foster's office?

A. Right.

Q. And who was present in Sergeant Foster's office at that time?

A. Like I say, Sergeant Foster was sitting behind the desk, as I recall, but I don't recall if Kirschner and Waite had come in, but it seemed like they had come in from their street investigation.

Q. You don't recall whether they were there or not? A. No, I don't.

(Testimony of P. H. Ryan.)

Q. Beg your pardon?

A. I don't know for sure.

Q. And were you and Thomas both present?

A. We just took him in the office and he sit down and we left. [117]

Q. Didn't you have any discussion with him?

A. None whatsoever. None that I recall.

Q. Did Thomas have any discussion with him?

A. I don't know of any.

Q. Beg your pardon?

A. I don't know of any.

Q. And you left, is that correct?

A. No, we were together all the time.

Q. No, I mean both of you left?

A. Yes, shortly after that we did.

Q. You didn't have any discussion with this man in any office during that period of time?

A. Any what?

Q. You and Sergeant Thomas had no discussion at all with Mr. Gonzales at any time during the time that you went up to the cell and brought him down?

A. No, the only thing that I said to him was up in the jail, "Come down with us."

Q. "Come down with us?"

A. I believe that is the only conversation I ever had with him.

Q. You had no conversation with him in any office on the way down? A. No, sir.

Q. You had no conversation with him in the presence of [118] Sergeant Foster?

(Testimony of P. H. Ryan.)

A. No.

Q. And when you left, as you recall it, Sergeant Foster was there and two other detectives?

A. I am not positive, I couldn't say for sure.

Q. Was Sergeant Foster alone?

A. There was other officers around there, but I don't recall all who was there.

Q. And then you and Officer Thomas left, is that correct?

A. I believe there was a couple of newspaper reporters there, too, I'm not sure.

Q. Did you and Officer Thomas leave at that time?

A. I think we might have went down to the Bureau of Records to check out on some license numbers.

Q. Did you leave the presence of Gonzales?

A. Yes.

Q. All right. When did you see Gonzales again?

A. I have never seen him since the trial.

Q. You have never seen him since?

A. No.

Q. Do you know whether Mr. Thomas has seen him since? A. No.

Q. You say that he didn't, or do you know?

A. I would say that he hasn't seen him.

Q. Beg pardon? [119]

A. I would say he hasn't seen him only at the trial.

Q. Only at the trial? A. Yes.

Q. I see. Detective Ryan, do you know whether

(Testimony of P. H. Ryan.)

or not the Police Department had brought in the detectives that were involved in this case just before Mr. Gonzales was transferred to the County Jail for the purpose of allowing an attorney of his to bring him down to attempt to make identification of some of the officers, or one or two of the officers, who he claimed had assaulted him?

A. I didn't get that question now at all.

Q. Do you recall whether just prior to the time that Gonzales was transferred from the City Jail on Yesler over to the County Jail, whether just about prior to the time he was transferred, whether or not the Seattle Police Department called in a number of the detectives who were involved in this case for the purpose of allowing Mr. Gonzales and his attorney to look them over and allow him, if possible, to identify one or more of the officers who he claimed had assaulted him? Do you remember?

A. I remember of something about it, but I don't know much about it at all.

Q. Do you remember whether or not you were there that day that his attorney, that is, Mr. Gonzales' attorney, came over to the police station to look over the detectives? [120]

A. Gosh, I don't recall.

Q. Do you recall whether you were there or not?

A. I can't recall. There was a lot of detectives there all the time.

Q. Do you recall the day when these people came over to look——

A. No, I don't recall seeing Gonzales again at all.

(Testimony of P. H. Ryan.)

Q. You don't know whether Mr. Thomas was there, either, on that day?

A. No. We usually work together.

Mr. Etter: That is all.

(Witness excused.)

KENNETH W. THOMAS

called and sworn as a witness on behalf of the respondent, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dimmick): Would you state your name to the Court, please?

A. Kenneth W. Thomas.

Q. You are a member of the Seattle Police Department? A. Yes, sir.

Q. And what is your rank in the department?

A. Sergeant of Police.

Q. And what are your duties in the department, your basic [121] assignment in the police department?

A. I have charge of the Safe Investigation Squad in the Detective Division.

Q. You are in charge of the Safe Investigation Squad? A. Yes, sir.

Q. In the Detective Division. Now, then, were you acting in that capacity on January 7th and 8th of 1950? A. I was.

Q. And do you recall on or about January 7th having had something to do with one Albert Gonzales? A. I do.

(Testimony of Kenneth W. Thomas.)

Q. And will you tell the Court what your connection with Albert Gonzales was?

A. My connection was Ryan and I had been working together, Detective Ryan, we were called in to assist in checking out a license on a car which allegedly had been used in this shooting, and in the course of our duties, we were in the office. At that time, Sergeant Paul Foster, who was in charge of the midnight to 8 a.m. shift, was in the office, he was alone in the office at the time answering his phone, and he asked Ryan and I to go up and bring down a man, he said, who had been arrested near the scene of the shooting, a suspect. And so we did and this man was the defendant Gonzales. We brought him down from the jail to Sergeant Foster's office. Sergeant Foster's [122] office in the old building was just back of the counter and visible two directions. It is a small office, seats about four or five persons. And Sergeant Foster began interrogating the defendant Gonzales and I did have the words—I did ask him if he was related to a Freddie Gonzales, a Philippino boy that I had connection with in a prior case, and he stated he was not related. Ryan and I went about our business of checking out this license number of this car.

Q. In other words, you heard the beginning of the interrogation or just the starting of it. Did you hear any questions asked particularly by Foster of Gonzales, or how long were you with Gonzales, let's say?

(Testimony of Kenneth W. Thomas.)

A. Oh, I couldn't say exactly, but we were with him a very short time. It couldn't have been over five minutes at the very most.

The Court: Where was this, Sergeant?

A. Well, that was from the time we took him out of jail, brought him in the elevator down to the Detective Division and into Sergeant Foster's office.

The Court: You did hear part of the interrogation, then?

A. I was there at the very beginning. He just started to interrogate him.

The Court: Was Lieutenant Ryan there too at that time?

A. He could have been. I don't know for sure if he was or [123] not.

The Court: You were together all the time, weren't you?

A. Well, for all practical purposes, yes.

The Court: All right, go ahead.

Q. (By Mr. Dimmick): All right, now, you were sitting back here when Gonzales pointed his finger at you and said that you were the man that beat him up? A. Yes, sir.

Q. Did you ever lay a hand on Gonzales in any way?

A. No, I never threatened, abused him or struck him in any manner.

Q. How many times had you seen Gonzales?

A. I saw him that one night I just related about bringing him down to the interrogation room, Ser-

(Testimony of Kenneth W. Thomas.)

geant Foster's office. I saw him next in court two or three months later, whenever it was.

Q. Have you seen him since that time up to date?

A. No, yesterday, I think, was the next time.

Q. Now your investigation of this business, then, other than having been asked by Foster, whom I understand is connected with Homicide, in bringing Gonzales down to his office, your only other connection was you were either assigned or asked to investigate an automobile in connection with the shooting, this car apparently or allegedly having been used in connection with the shooting? [124]

A. Well, there was another part of the investigation in which we took part, which did lead up to the identity of the driver of the car, or at least one of the occupants, and that was shortly after the shooting when we went out to the South end to help look for these men that had done the shooting. Understand, at the time of the shooting there was quite a furore, hue and cry, a number of cars from all over the city were sent in looking for these three men that done the shooting. We were asked to come in also to check out the car, and so were close by and we decided to watch Rainier Avenue, which was the main arterial leading from where the shooting took place into the city.

Q. You were looking for this car?

A. We were looking for suspects, any Philippinos. The order that came in over the radio was that there were three Philippinos involved in this

(Testimony of Kenneth W. Thomas.)

shooting that had escaped on foot. And at that point, while watching Rainier Avenue, a car drove by south from the shooting, a white man driving the car, a Philippino as a passenger. We stopped the car for investigation, questioned the occupants. The driver was a white man, a soldier who was out of uniform, a man by the name of Larson. He had his identification and a good story. The Philippino's name was Villa.

Q. Was what? [125]

A. V-i-l-l-a. Sonny Villa, he called himself. He was clean, his clothes were not disarranged, he had a good story and the soldier vouched for him. So after taking their names and identification, got the information that the soldier was driving a car owned by William Giron, gave us the address which we wrote down, and we let them go on their way. So then we have to go on, it was probably four hours later when we found out that the soldier we had stopped was the same one who had rented the car used in the shooting.

Q. I don't want to prolong this too long. But, in any event, you, of course, have emphatically denied ever having laid a hand on Albert Gonzales?

A. Absolutely.

Q. Yes. And actually, as far as Gonzales is concerned, you only spent some, oh, five minutes, maybe six minutes, maybe seven, maybe four, the time it took you to bring him from his cell down to Foster's office and turn him over to Foster?

A. That is correct.

(Testimony of Kenneth W. Thomas.)

Mr. Dimmick: That is all.

Cross Examination

Q. (By Mr. Etter): Do you recall what time it was that you brought the [126] petitioner Gonzales from his cell in the Central Seattle Police Station down to Sergeant Foster, or to Mr. Foster, whatever his rank may be, for questioning?

A. No, I can't tell you what the time was. I would guess around two o'clock. It could be two-thirty, I don't know.

Q. Was it before you had made the investigation and had talked to the soldier and the Philippino in this particular car? Was it before that?

A. It was after we had talked to the soldier.

Q. It was after you had talked to the soldier?

A. Yes, sir.

Q. That you brought Gonzales down?

A. Yes, sir.

Q. And you were aware at that time, of course, of the facts that you detailed that you found out by talking to the soldier and talking with the Philippino Villa?

A. Not at that time, we didn't. It was after that.

Q. Beg pardon?

A. Not at that time. They weren't suspects of any kind. All we had was their names.

Q. I see. When you were there in the police station, do you recall who was present at the time you were requested to go up and bring this man down?

(Testimony of Kenneth W. Thomas.)

A. Who was present besides Sergeant Foster? He was alone in the office. [127]

Q. He was alone in the office?

A. Yes, sir.

Q. Along with you and Sergeant Ryan?

A. Right.

Q. Nobody else there? A. No, sir.

Q. So you went up and got Mr. Gonzales and brought him down? A. Right.

Q. All right, when you brought him down, who was in the office at that time?

A. He was still alone in the office.

Q. He was still alone in the office. And you stayed there for part of the questioning, is that correct? A. No, sir, I did not.

Q. You did not. You left? A. Yes.

Q. Did you hear any queries or any statements made by Gonzales or made by Sergeant Foster while you were there?

A. No, the only question was, after I got there I asked him if he was related to this Freddie Gonzales, and he said no and wanted to know why, or something like that, and just had a few words with him, and then Sergeant Foster started to interrogate him and then Ryan had already left and I went out and joined Ryan and we went about our business. [128]

Q. I see. You and Ryan left Sergeant Foster and Albert Gonzales then in the office?

A. When we left, they were alone.

(Testimony of Kenneth W. Thomas.)

Q. Did you see Officer Seth around that night?

A. No, sir.

Q. You did not. The next day, I assume it was, that you and the officer who just testified, Detective Ryan, arrested Coluya, one of the petitioners, is that correct?

A. Yes, it was the next morning. It was approximately 24 hours later.

Q. That would be on Sunday morning?

A. I can't tell, but it was about 24 hours later. I don't know the days of the week or the dates.

Q. Well, Officer, I'll tell you this, the arrest of Gonzales was made on Saturday morning, early Saturday morning, so would this have been Sunday morning?

A. It would have been Sunday morning, yes, sir.

Q. Beg your pardon?

A. It would have been Sunday morning, yes, sir.

Q. It would have been Sunday morning?

A. Yes, sir.

Q. And between the time that you had brought Gonzales down from the Central Seattle Police Station to have this conversation with Sergeant Foster and the time that you arrested Coluya, can you tell us whether you had any [129] conversation, that is, either you or Detective Ryan or both of you, whether you had had any conversation with Police Officers Seth or Sprinkle or Foster concerning any statements that had been made by Gonzales before you made this arrest of Coluya?

A. Well, just prior to the arrest of Coluya,

(Testimony of Kenneth W. Thomas.)

which was about 24 hours later, either Sprinkle or Seth stopped Ryan or met us in the building and told us that Gonzales had copped out—that is the term for confessed—and named the other two men. They were going to go then to arrest one of the men, Coluya, and wanted us to go along, which we did, but there was no details as to confession or statement.

Q. Who else was with you? Was anybody else with you and Detective Ryan when you arrested Coluya?

A. Yes, there was someone else. I'm not sure who it was, I think it was—I think Sergeant Byrd was there and possibly Sergeant Foster, but I'm not sure. I know there was some other officers with us.

Q. You are not sure. When you talked to these officers—I think you said it was Officer Sprinkle that told you about Gonzales copping out? Is that what you said?

A. No, I said one of them, I don't——

Q. One of the two officers, either Officer Seth or Sprinkle. At that time, did either Officer Seth or Sprinkle tell [130] you that Gonzales had complained that you had punched him or you had bounced him, hit him in the groin, or had assaulted him in any way? A. No, sir.

Q. Did either one of them mention that to you?

A. No, sir.

Q. Did Officer Seth tell you that he had taken him right after the second statement and taken a

(Testimony of Kenneth W. Thomas.)

picture of him stripped to the waist? Did he tell you that? A. No, sir.

Q. Beg your pardon? A. No, sir.

Q. I see. Do you recall whether or not you were requested to be at the jail upon the request of Gonzales' attorney just before he was transferred to the County Jail to have Gonzales attempt to identify any officer or officers who he claimed had assaulted him? Do you recall that?

A. No, sir, I was not asked. I had heard about it later, some of the officers had been asked to go, but I wasn't.

Q. You heard, did you not, that his attorney and Gonzales had both come over to the police station to try to identify the officer or officers who had beaten him, or he claimed had beaten him, is that correct?

A. At that time I learned he claimed he had been beaten up and they tried to make an identification. [131]

Q. You were not there when they tried to make the identification, is that correct?

A. No, sir.

Q. This man Molina, the deceased, were you acquainted with him? A. No, I never——

Q. Beg your pardon?

A. No, I never saw the man in my life.

Q. You don't know him at all?

A. No, sir.

Q. I see. Had never met him?

A. Not to my knowledge, no.

(Testimony of Kenneth W. Thomas.)

Q. Did Mr. Gonzales ask you, Officer, for the right to call a lawyer? A. No.

Q. Beg your pardon?

A. No, he never asked me.

Q. Did he ask you to let him use the phone to call a lawyer or friend of the Consul in Seattle? Did he ever ask you that? A. No, sir.

Q. Beg your pardon? A. No, sir.

Q. And the only time that you saw him, according to your testimony, is for this brief period of time that you have [132] told us about?

A. Yes.

Q. Is that correct? A. That is correct.

Mr. Etter: That is all.

Mr. Dimmick: That is all.

(Witness excused.)

AUSTIN W. SETH

called and sworn as a witness on behalf of the respondent, was examined and testified as follows:

Direct Examination

Q. (By Mr. Dimmick): You are Austin W. Seth and you are employed by the Seattle Police Department? A. That right.

Q. What is your official capacity?

A. Sergeant in the Homicide and Robbery Detail.

Q. You are a Sergeant in the Homicide and Robbery Detail? A. Yes, sir.

(Testimony of Austin W. Seth.)

Q. Were you acting in that capacity on January 7th, 8th and 9th, 1950? A. Yes, sir.

Q. And did you, in the course of your employment, have occasion to investigate a murder in which the petitioners [133] here were involved?

A. Yes, sir.

Q. All right. Now let me ask you this: You knew during the course of your previous investigation of the matter, I take it, the approximate time that the crime was committed? A. Yes, sir.

Q. And the time that Albert Gonzales was arrested? A. Yes, sir.

Q. And brought in for questioning?

A. Yes, sir.

Q. Now at what stage of the proceedings did you make your appearance?

A. The homicide occurred on the 7th, January 7th, at approximately 12:33 a.m.; the defendant was arrested about an hour later. Detective Sprinkle and myself did not come into this particular case until the evening of the 7th at approximately 10:30 p.m.

Q. In other words, he had been in custody then how long, approximately, at the time you made your initial appearance in the case?

A. Well, around 20 hours, somewhere around there.

Mr. Etter: You mean the evening of the 8th, then, don't you Officer?

A. No, sir, the evening of the 7th. He was arrested on the [134] morning of the 7th.

(Testimony of Austin W. Seth.)

Mr. Etter: I see.

A. My partner and I at that time were working midnight—excuse me—four to midnight shift, and we had gone home at midnight, one-half hour before the homicide occurred, and we did not return to work until 4 p.m. of the 7th, the date of the homicide, and we already were working on a case for several days there and we continued that until appproximately 10, 10:30 that evening, when we started on this one.

Q. (By Mr. Dimmick): All right, you say that was approximately 10:30 p.m. of January 7, 1950. Now will you tell us what occurred at that time, what happened?

A. Well, at that particular time, Sergeant Foster asked Detective Sprinkle and I if we would talk to the suspect because of our association with his brother in several previous cases that we had and that we knew Max Gonzales fairly well. We also knew the victim in this particular case.

I say approximately 10:30; it could have been 10 or 11, as far as that goes, we arrived in the station.

We read over all the reports available, and at that time we went upstairs, signed a slip, took the defendant out of his cell where he was placed, and brought him down to the Detective Division. In the Detective [135] Division, we talked to him for probably half an hour or longer.

Q. You and Sprinkle were down there together with him? A. Yes, sir.

(Testimony of Austin W. Seth.)

Q. Brought him down together. Now I want to ask you specifically: You heard Gonzales testify, I think, that you introduced Gonzales to Sprinkle and said, "Mr. Gonzales, Mr. Sprinkle." Then from then on during the entire period of this questioning, he testified that at no time were you two people together in the room with him; that one of you would go out and the other would come in and question him.

Now, then, is that right or not?

A. No, that is wrong. I would like to explain. The defendant may be somewhat confused about that.

Our wire recording machine is just outside the door, or at that time was just outside the door, and from time to time either Detective Sprinkle or myself would get up and take a look at the machine to see that it was still operating, but that didn't put us further than six feet way at all times. We were otherwise in the room.

Q. Together? A. Yes.

Q. And were you questioning him alternately?

A. Yes.

Q. Or would you take turns questioning him?

A. Alternately.

Q. I mean, you would ask a question and he would answer it and then Sprinkle would ask a question, is that right? A. That is true.

Q. Now did you at any time threaten Albert Gonzales with any type of physical harm or threaten to turn him over to anybody who would commit

(Testimony of Austin W. Seth.)

some bodily harm on him if he didn't confess to having committed this crime?

A. No, sir.

Q. Now let me ask you this: You did say that you had stepped out to check a wire recording that you were making of your conversation with Albert Gonzales here? A. That is true.

Q. At any time when either you or Sprinkle were checking the recording machine, was anything said in the room that you couldn't hear?

A. No, sir.

Q. You were able to hear all the conversation?

A. At all times, yes, sir.

Q. Did you at any time hear Sprinkle threaten to send Albert Gonzales down to one of the other rooms where some strong-arm boys would beat him up? A. No, sir. [137]

Q. Now, then, I notice that this confession here signed by the petitioner Gonzales is witnessed by D. R. Sprinkle—here, let me show you—and Sergeant Seth. This thing is witnessed by Sprinkle and yourself. That is the confession that was signed?

A. That is it, sir.

Q. Now, then, you heard Gonzales testify that this confession was taken by Sprinkle and signed by Sprinkle and that is your signature on there also, isn't it? A. Yes, it is.

Q. Were you present at all times during the time that this confession was taken?

A. I was.

Q. Who wrote the confession?

(Testimony of Austin W. Seth.)

A. Detective Sprinkle.

Q. Detective Sprinkle wrote the statement. And he answered, was it in response to questions that you gave him, or was this just a story that he related to you?

A. In response to a story that he related as we went along. We would occasionally, to clear up matters, ask questions.

Q. And during the whole taking of this thing, you were both present in the room?

A. Yes, sir.

Q. And you recognize this as the confession?

A. Yes, this is Detective Sprinkle's writing. It is his signature and my signature, signed at 2:10 a.m.

Q. On January 8, 1950? A. That's right.

Q. How much time did you spend with Mr. Gonzales here?

A. I would say approximately from 11:30 to 2:15.

Q. From 11:30 to 2:15, approximately two hours and 45 minutes?

A. Somewhere around there, yes, sir.

Q. Let me——

The Court: I didn't get that two hours, 45 minutes?

Mr. Dimmick: From 11:30 p.m. to approximately 2:15 a.m.

Q. Let me ask you this: Was this confession that Gonzales signed here in your presence, was

(Testimony of Austin W. Seth.)

that confession given freely and voluntarily as far as you are concerned? A. Yes, it was.

Q. You told me that some things perhaps happened during the course of the confession that might have induced Gonzales to talk. Would you tell the Court what that was?

A. Would you state that again?

Q. Well, you told me, you recall, in our previous conversation in connection with this case that you may have said something that induced Gonzales to talk. Would you tell [139] the Court about that?

A. Yes, I believe that some—possibly some deceit was used in this extent, that we did know his brother and we did sympathize with the suspect at that time.

Q. You sympathized with him? You mean, "It is too bad that Fidel killed your brother Max?"

A. Yes, that is true. And we said, "Well, maybe he had it coming."

Q. What?

A. And we probably—I believe one of us said, "Well, Fidel probably had it coming."

Q. In other words, if there was any persuasion here, it was a peaceful type of thing by your sympathy for Albert?

Mr. Etter: Slightly leading, and I will object to it.

The Court: Yes, I think it is leading.

Mr. Dimmick: Well, all right. If he can't say it, I will have to say it for him.

(Testimony of Austin W. Seth.)

Q. One more thing. There was a tape recording made of this whole conversation?

A. A wire, sir.

Q. A wire recording? A. Yes, sir.

Mr. Dimmick: Now I have this wire recording here, your Honor. We have a certified copy of an order directing [140] transmittal of the exhibit to the United States District Court, City of Walla Walla, signed by Judge James W. Hodson of the Seattle Superior Court. Wasn't there an affidavit here? Yes. Also, by way of being a statement that the recording contained in this bag is the recording that was used in the trial, in the murder trial in Seattle, at the time he was tried and they used the entire recording of the period in question during the time that Albert Gonzales was being questioned by Detective Sprinkle and Sergeant Seth.

I offer it to the Court for no other reason but to prove that Gonzales is either awfully badly mistaken about some of the things that happened there or else he is not telling the truth, because he testified directly and squarely that these two men at no time questioned him when they were together in the room, only alternately when one or the other was outside. Now this recording, I think, will definitely establish the fact that these men were in the room, and will certainly establish the fact that there was no coercion or force used by these people in eliciting this confession from him.

Mr. Etter: In answer to that, I submit, your Honor, that the matter of his confession and this

(Testimony of Austin W. Seth.)

wire recording are the questions in issue in this hearing, whether they are admissible in a proceeding involving a hearing of this kind before your Honor under the guarantees of the Federal [141] Constitution, and I therefore am going to object to the admissibility of any part of this wire recording until it is first determined whether or not there were trustworthy and voluntary confessions and statements given, both as to the two exhibits that are now in and likewise as to the proffered exhibit of the state.

Mr. Dimmick: We have denied each and every material allegation made by Albert Gonzales. In fact, the very men named in the petition have denied any connection in any way, shape or form. The witness here who was present——

The Court: Just a moment, Mr. Dimmick. I think the Court here isn't trying out the question of the guilt or innocence of these petitioners; that is a question that is present only very incidentally, if at all. The issue before this Court is whether or not their Constitutional rights have been violated in the process of their trial in the state court.

Now I think that the Court should inquire fully into the circumstances of this confession which was allegedly coerced and not given voluntarily. I think the witness here could detail, as nearly as he could remember, what they asked Gonzales, what Mr. Gonzales answered, and that is what is on the tape recording.

If there is no question about the identification

(Testimony of Austin W. Seth.)

of it, I think it should be admitted. Do you propose to play [142] it here or just have it available for use?

Mr. Dimmick: No, sir, I propose to play it. It takes about 35 minutes.

The Court: I think it should be admitted and objection on the part of the petitioners.

Court will recess now for ten minutes.

Mr. Etter: Your Honor, before we conclude, may I inquire on voir dire before the Court rules on the admissibility of this?

The Court: Yes, you should have permission to do that.

Mr. Etter: All right.

The Court: I think we will take a ten minute recess first.

(Whereupon, a short recess was taken.)

The Court: Proceed.

Voir Dire Examination

Q. (By Mr. Eter): Now, Sergeant Seth, this wire recording that was taken during the time, or at least a major portion of the time, that you were questioning Albert Gonzales and during the time that the confession was taken, is this recording here the recording that was taken during this period of time? A. Yes, it is. [143]

Q. Now, how do you know that?

A. Because of my voice. Thursday, last week, along with Judge Hodson, we removed——

Q. Judge Hodson who signed the order?

(Testimony of Austin W. Seth.)

A. Yes, sir, and the presiding judge at the trial —removed this from the—I believe it is the county property room where it was placed by the court. The wire recording was taken away from us at the trial and it had never been returned to us, it has been in the custody of the court ever since. Judge Hodson removed this personally and listened to it.

Q. Were you present at the time?

A. Yes.

Q. When he removed it?

A. Yes, sir. And brought it down to his chambers, listened to it on the wire recorder. He sealed it himself in that envelope, and the legal papers was made out for him and he signed them.

Q. And the recording that was taken from the vault by yourself and Judge Hodson is that recording, and that recording is the one that was made during the questioning period by yourself and Sprinkle? A. Yes, it is, sir.

Q. Now I gather from your testimony, Officer Seth, that you questioned Petitioner Gonzales from approximately 10:30 [144] until about 2 o'clock?

A. I would say about 10:30 we got him out of jail, somewhere around there.

Q. Until about 2 o'clock? A. Until 2:10.

Q. Now did you or Officer Sprinkle bring him into the particular room where you questioned him?

A. Yes, sir.

Q. You did?

A. I can't recall, I believe both of us together did that, sir.

(Testimony of Austin W. Seth.)

Q. And when had you arranged for the wire recording? I mean, when did you set up the apparatus? Prior to the time you called him in or after?

A. The wire was—we talked to—if I can backtrack here, we talked to Albert Gonzales for a few minutes. He had to wait for a short time while we went over the case a little more. He sat out in the main office of the Detective Division. Then we brought him into the interrogation room and all three of us sat down, and at that time we had forgot to put a wire on this and I requested one of the other detectives to put one on and I believe it was Detective Kirshner or Waite that put on a wire. It only took several minutes to do it. But that would be approximately 11, 11:30, that the wire was put on to [145] the machine.

Q. Will you tell me now, did you advise Mr. Gonzales that you were making a wire recording of his statement? A. No.

Q. Beg your pardon? A. No.

Q. You did not? A. No, sir.

Q. Did you at that time advise Mr. Gonzales that any statement he might make would be used against him in the event of a criminal prosecution or during a trial?

A. We didn't advise him of that. We told him he could tell us the story if he wanted to, or he didn't have to.

Q. Or he didn't have to?

A. That is true.

Q. Was that on the recording, that statement?

(Testimony of Austin W. Seth.)

A. Yes, sir.

Q. That is on the recording?

A. Words to that effect. I'm not sure just how it is stated, but I believe you will find that on the recording.

Q. Now during the taking of the wire recording, did you have a discussion with him about his brother's death? A. There was some, yes.

Q. And I noticed here you testified that there was some [146] "deceit," I think you called it, in that you made a statement to him that this fellow Molina probably had it coming to him or some such statement as that.

A. Some statement such as that, yes.

Q. Does that appear on the wire recording?

A. I believe you will find some similar statement on the wire recording.

Q. A similar statement? A. Yes.

Q. And did you have a discussion with him or did you show him a picture of a Philippino who had been killed and talk with him about this picture at the time? A. Yes, that is true.

Q. And is that on the wire recording?

A. No, that was a little before. That was while we were out in the general detective office that I showed him that. I'm fairly certain it was, I don't think you will find that on the wire at all. It was regarding a case in Tacoma, or between Tacoma and Sumaner, no relation to this case at all.

Q. Does any of the preliminary questioning, that is, that you had with him about this case in

(Testimony of Austin W. Seth.)

the detective room prior to the time you took him into this interrogation room, does any of that appear on the wire recording?

A. Well, there is a considerable amount of our discussion [147] about his brother and different things before we start taking the confession from him on the wire here.

Q. In other words, you had a considerable discussion with him about related facts before you started taking it on the wire?

A. No—well, I see what you mean. Out in the Detective Division we talked to him for a few minutes. There is not much more than what is on this wire.

Q. Well, I gather now, though, from what you say that you didn't have the wire put on, I mean you didn't get any of the conversation, until about 11:30?

A. Yes, that is true. But there was very little conversation out in the other room. He was waiting in the presence of other people there and we didn't question him about this case whatsoever.

Q. Well, he had been out in the other room approximately an hour, if you brought him down at 10:30, had he not?

A. Somewhere around there, yes.

Q. What was going on during that hour prior to the time——

A. He was waiting for us while we were looking over the case. We like to know what the case was all about before we started on it.

(Testimony of Austin W. Seth.)

Q. Weren't you talking with him out there?

A. Just about his brother.

Q. Beg pardon? [148]

A. Just about his brother.

Q. I see. Well, actually, the questioning then that you are talking about, that is, so far as the wire recording was concerned, commenced about 11:30 and lasted until about 2?

A. Yes, that's right.

Q. Or about two and a half hours?

A. Somewhere around there.

Q. Is that correct? A. That is true.

Q. And there were alternate questions back and forth by you and by Officer Sprinkle?

A. That is true.

Q. Now, will you tell us, Officer Seth, the wire tape that you have here which you have presented to this Court, is that the total and the complete audible record of two and a half hours of interrogation made by you and Officer Sprinkle of the petitioner Gonzales?

A. I would say lacking about three minutes while the detective put on the wire and we were in the interrogation room just sitting down. I think Detective Sprinkle introduced himself and introduced me to Gonzales, to give him our names, and I don't believe that is on there because a few minutes after it started, he asked, defendant Gonzales asked my name again. I think you [149] will find that on the recording.

Q. Well, then, what I am getting at is a yes

(Testimony of Austin W. Seth.)

or no answer to this question: Aside from what you have mentioned, is the transcription on this wire recording that you are presenting here to the Court, is that the total and the complete audible record of two hours and 45 minutes of interrogation of Mr. Gonzales?

A. Of interrogation, yes.

Q. Well, now, you say "of interrogation?"

A. That is true.

Q. All right, is it the total and complete audible record of the two hours and 45 minutes of interrogation and other discussion of any kind whatsoever carried on in that room for two hours and 45 minutes? A. No.

Q. Beg your pardon? A. No.

Q. Well, was there other discussion at the time carried on in the room?

A. No, it is just, as I explained, that the first two or three minutes is not on the wire, taking him in there and introducing ourselves to the defendant.

Q. Yes, I understand that, but I am excluding that now, I am excluding your introduction, I am trying to get you started from the time—— [150]

A. Yes, I see.

Q. Excluding that. Now I want to ask you if the wire recording that you have here, the transcription on this wire recording that you are offering here to the Court for examination which you have presented here, is that the total and complete audible record of all of the interrogation and all of the discussion of every conversation whatsoever during

(Testimony of Austin W. Seth.)

the two hours and a half that you and Officer Sprinkle had this wire recording on in this room until 2 o'clock? A. No. Can I explain that?

Q. Yes.

A. After talking to the defendant for quite sometime, which is on this wire, I requested him to give a statement to Detective Sprinkle and this, I figured, would take some time so I shut the machine off while Don, or Detective Sprinkle, wrote down the statement. Then we switched it back on while he read the statement to the defendant, handed it to the defendant and had him read it back to us, had him make the changes that he required and sign it. That is on the wire. But that space in there where he actually wrote down the statement, which takes a considerable amount of time, and we had gone over and would go over in the statement, is not on there.

Q. Is that all that is missing? [151]

A. I believe that is all that is missing.

Q. Are you sure that is all that is missing?

A. Yes.

Q. All right, then, your statement is this, that other than the preliminary conversation, that is, when you identified yourselves, other than the time that you turned the machine off for the purpose of Officer Sprinkle writing down the statement, which was read back by the petitioner, other than those two periods of time, it is your testimony that you are presenting here a total and complete audible record of the two hours and 45 minutes of

(Testimony of Austin W. Seth.)

interrogation and other conversations, excluding that which I have inquired about?

A. Yes, I would say so.

Q. You stated that during the time that Officer Sprinkle was writing down or was taking down this confession, that it required some time. Will you tell us why?

A. Well, to write a statement takes a considerable length of time.

Q. Why?

A. In questioning and getting it straight.

Q. Getting it straight?

A. You have to ask the question and then the defendant or the suspect gives his answers, and in putting that on the paper takes a longer time than we used in the actual [152] questioning, probably.

Q. Well, as a matter of fact then, the matter of the statement itself, which I presume is the Exhibit 2—I will ask you to take a look at that and see if that is the statement that you refer to?

A. Yes, that is the one we took.

Q. And during the time you were taking this statement, there were questions and answers, were there not? A. Yes.

Q. And some discussion between you and Officer Sprinkle and Mr. Gonzales? A. That is true.

Q. And none of this appears upon the wire recording, is that correct? A. No, sir.

Q. Beg your pardon? A. No, sir.

Q. Now will you tell me at whose discretion or with whose permission, if any, any of the editing

(Testimony of Austin W. Seth.)
of this particular transcription or any of the deletions in the transcription might have been made?

A. The only deletion, sir, I believe I made myself, and that is turning the wire off during the writing down of the statement. We wouldn't have had enough wire to cover the whole thing. [153]

Q. I see. As a matter of fact, then, it was at your discretion that the wire was turned off and it was your discretion when the wire was turned on?

A. That's right, sir, I did it myself.

Q. And no advice was given to Gonzales of the time you turned the wire off? A. No, sir.

Q. None was given to him of the time that you turned the wire on? A. That is true.

Q. Is that correct? A. That is correct.

Q. And nothing appears upon the wire recorder concerning any of your conversations, your questions or your answers concerning the composition of Exhibit No. 2, which you have examined?

A. That is true.

Q. Is that correct? A. That is correct.

Q. Can you tell us, of the two hours and a half during the time that you had the wire recording machine turned on, Officer, can you tell us what percentage of the time or what part of that time was employed or used in the questioning and answering and discussions having to do with composition of the Petitioners' Exhibit No. 2? [154]

A. I can't tell the exact time on that. This wire only runs for so long. It wouldn't be, certainly

(Testimony of Austin W. Seth.)

wouldn't be, oh, any two and a half hours. I think we have one hour wires and two hour wires.

Q. I see.

A. And, as far as that goes, I don't know which one this is.

Q. I see.

A. And we are instructed how to put them on this machine, how to operate it, and that is all. And I was afraid that we were going to run out of this wire and I wanted the final of Detective Sprinkle reading the statement to the suspect and the suspect reading it back to us.

Q. Well, you say that is about 35 minutes?

A. I believe it is. Probably a little longer than that.

Q. Well, Mr. Seth, can you advise me how the two and a half hours of interrogation, discussion and otherwise, was reduced, or appears to be reduced, to a period of 35 minutes of recording?

A. May I look at this? Like I say, I am not sure just how long this wire is, but the longest period of time, I would say, is in getting this statement down from the suspect.

Q. I see.

A. We talked for awhile—that is on the wire —shut it off, [155] got the statement down, and then turned the machine back on and he gave us —that is, we go back over the statement at that time.

Q. This wire, however, is a recording, is it not, of only 35 minutes of the actual audible record of

(Testimony of Austin W. Seth.)

the two hours and 45 minutes of interrogation and discussion, excepting only the introduction and this discussion you had about Exhibit No. 2?

A. Yes, I believe so.

Q. Is that correct? A. Yes.

Q. So that, assuming you commenced at 11:30, as you have stated, there are approximately two hours of occurrences and discussion and happenings in that particular interrogation room that are not recorded on this wire recording; am I correct?

A. If we started at 11:30, I believe the first half hour to 45 minutes would be on the wire.

Q. On the wire?

A. Yes. Then the lapse of time would be on, and then the last 15, 20 minutes will be on the wire, probably.

Q. The last 10, 15 or 20 minutes?

A. Yes, that is true.

Q. So in all, there can't be over a total of 40 or 45 minutes on that wire, is that correct? [156]

A. No, there will not be.

Q. Is that right? A. That is true.

Q. So that there is approximately an hour and a half or an hour and three-quarters of conversation, interrogation and discussion, starting at 11:30 and finishing at 2 o'clock, which is not on this particular wire recording; is that correct?

A. Yes, I would say it takes about an hour to an hour and a half to take that statement that we have.

Q. And that is because of the discussion you

(Testimony of Austin W. Seth.)

had concerning the statement, isn't that right, with Gonzales?

A. Yes, as he was going along taking the statement.

Q. And the elements that make up the confession, is that correct? A. That is true.

Q. And there were questions and answers back and forth during that period of approximately an hour and a half; isn't that right? A. Yes.

Q. And that is not on the wire recorder?

A. That is true.

Q. But it has to do with this particular case and with this particular alleged murder, is that right? A. Yes. [157]

Q. And it was within your power and you exercised the discretion to turn the wire on and off during that period of time? A. I did.

Q. Is that right? A. I did.

Q. So that this transcription that you are presenting here is not the total and the complete audible record of the two hours and a half of questioning, answering and inquiry into this particular case that you had with the petitioner Gonzales between the hours of 11:30 and 2 o'clock on the 7th day—let's see—August, I guess it is, 1950?

A. January.

Q. Pardon me, the first month, 1950.

A. Starting the 7th. The interrogation started on the 7th and would finish up on the 8th.

Q. That's correct. A. Yes.

Q. But I mean this is not, then, the total——

(Testimony of Austin W. Seth.)

A. No.

Q. ——audible recording of that questioning period from 11:30 until 2 o'clock, is it?

A. That is true, it is not.

Mr. Etter: That is all, and I am going to object to [158] the admission of the exhibit on the same basis, your Honor, that I will object to a written instrument or part of a confession, on the ground that it obviously appears that the greater percentage of the conversation, questions and answers having to do with the alleged confession which was used for the purpose of conviction and which we claim was coerced, does not appear, nor any part of the preliminary conversation having to do with this same subject as this wire recording; on the further ground that the exercise of discretion and permission in taking that which the particular authorities wanted on the recording machine was taken and eliminating that which was not wanted. It is not a complete transcript or wire recording of the entire confession or of the entire conversation, period of time, having to do with the material elements of this during the period from 11:30 to 2 o'clock on the date in question.

The Court: I think the matters that have been brought out on cross examination go to the weight that should be given to the recording. It should be considered in the light of the disclosure here that it doesn't cover the entire conversation, but I don't think that it bars its admissibility so far as it goes.

(Testimony of Austin W. Seth.)

The Court will admit it and the record will show the objection of the petitioners.

As a practical matter here, I was just wondering [159] what is the best way to get this recording in the record. I don't think the Court of Appeals has any facilities to play the tape.

Mr. Dimmick: Your Honor, we have a transcript here of the record as it is played and the problem, of course, is for the reporter to identify the people who are talking, and this, of course, does identify those people. I think the voice of Gonzales is certainly distinguishable, and Seth has a rather deep voice and I understand Officer Sprinkle has a higher voice.

The Court: Well, your recording is on a tape here, isn't it?

The Witness: A wire.

The Court: Oh, a wire?

The Witness: Yes, sir.

The Court: Rather than put the wire physically in evidence as an exhibit, why not play it in the record as we would read a deposition into the record, be taken by the reporter. Would you have any objection to that, Mr. Etter, if a transcript were furnished to the reporter for his use and guidance when he goes to make up his transcript, if he does have to?

Mr. Etter: I have no objection to that, your Honor.

The Court: I don't think the transcript should be substituted, but it would be helpful to the re-

(Testimony of Austin W. Seth.)

porter if it is [160] left with him. He can use it as a guide and as a help.

Mr. Etter: That is correct.

The Court: Are there any further questions of Officer Seth?

Mr. Dimmick: Yes, your Honor, after the record, I do have some.

The Court: All right.

Mr. Etter: Oh, before they start playing that, one or two questions, your Honor, if I may.

The Court: Yes, all right.

Q. (By Mr. Etter): When you were talking with Mr. Gonzales prior to the time that you took the wire recording, will you tell us whether or not at that time he requested of you that he be allowed to call counsel, call his lawyer?

A. I believe that during the time of making his statement, he requested—yes, I recall now, we made three or four attempts to get hold of the lawyer he called for. I believe you can verify that by the attorney himself, a Mr. Vertres, he requested at that time. His attorney during the trial was a Mr. Freeley, but at the time he requested a Mr. Vertres. Detective Sprinkle called, I called, and I believe the defendant himself called the number to get hold of Mr. Vertres.

Q. When was that, when you came on at 10:30?

A. I can't give the exact time, sir. I know that we got [161] hold of Mr. Vertres and I don't know if the defendant talked to him or not. I know I talked to him, and I believe I got hold of him

(Testimony of Austin W. Seth.)

about, oh, 2:30 in the morning. I'm not sure about that, but we had called several times during the evening, or evening and morning.

Q. I see. During the time that you were talking to him and prior to the time you took this tape recording, did Mr. Gonzales complain to you that he had been abused while he had been in the police station?

A. Not while we were in the interrogation room and not to me. Now he may have requested or told Detective Sprinkle this prior to going into the interrogation room while we were out in the main office. The first I heard of this was on the 9th, and at that time I immediately requested he be taken to the 4th floor of the police station, which was a city hospital, and given an examination. We have the doctor's statement and who failed to find any marks, any evidence——

Mr. Etter: Just a minute. I will object to any doctor's statement at all.

A. All right, sir.

Mr. Etter: Unless he is here.

A. And I took pictures.

Q. You took pictures? A. Yes. [162]

Q. When did you take pictures?

A. That was either the 8th or 9th, I'm not sure. It was as soon as the defendant told us that he had been beaten.

Q. When did he tell you that?

A. The first I knew of it—I'm not too sure about this—I believe it was the 9th. It could have

(Testimony of Austin W. Seth.)

been the evening of the 8th, because we started on this case on the evening of the 7th and I believe it was the next day, so it is probably the 8th.

Q. It was probably the 8th?

A. Probably, yes.

Q. That you heard about it?

A. Yes.

Q. And he had never said anything about it until that time?

A. Not to me, personally.

Q. Did he say it to Sprinkle that you know?

A. Not that I know.

Q. How did you say he might have said it to Officer Sprinkle?

A. Not in my presence, but he could have said something. I don't believe he did because Don, or Detective Sprinkle, would have let me know.

Q. He didn't say anything to you about it?

A. No, sir, he did not.

Q. And you say that Mr. Gonzales hadn't said anything to you [163] about it?

A. Not to me, personally, no.

Q. Had you been informed that he had been in custody since the morning of the 7th, that is, early Saturday morning?

A. When we started on the case?

Q. Yes? A. Yes, I knew that.

Q. You had been advised of that?

A. Yes.

Q. And can you tell me whether or not there

(Testimony of Austin W. Seth.)

was at that time a police court in the old central city police station?

A. Yes—wait a minute—that would be on a Saturday. I am a little confused on my dates here. What would be the 7th?

Q. 5 a.m., January 7th, that would be Saturday morning, January 7th.

A. That is on the 7th.

Q. There was a police court, was there not, in the old Seattle central police station?

A. There was a police court in the station and I'm not too sure whether the session is on Saturday there or not. I don't believe there is a police court session on Saturday.

Q. You made no inquiry? [164]

A. No, I did not.

Mr. Etter: I see. That is all, your Honor, on voir dire.

Mr. Dimmick: I would like to reserve any further examination at this time.

The Court: All right, you may continue interrogation after you put this on. Will you operate the machine then, Sergeant?

The Witness: Yes, sir.

(Whereupon, the aforementioned wire recording was played by the witness, of which the following is a literal transcription:) [165]

Transcript of Wire Recording

Gonzales: Of course, in my case, I know I am in a rough spot. When you are in a rough, tough spot

(Testimony of Austin W. Seth.)

like that, it is best to keep away. I mean, you're bound to, you know, in that case.

Seth: You want to protect these other people because of their families. Like Giron?

Gonzales: Giron.

Sprinkle: Giron can't get out of it. We've got the proof on him. See, he bought the guns, we got the proof on that.

Gonzales: You see, I have sympathy for those kids. Especially the other fellow, his wife is going to have another baby.

Seth: That is Cecil?

Gonzales: Yes.

Seth: Uh huh.

Gonzales: I am coming up to the front now. Giron he has got four kids.

Seth: Yes, he has four children.

Gonzales: Of course—of course, when I talked to them, they have a grudge for a long time on him.

Seth: Oh, they didn't like Fidel, either? [166]

Gonzales: They have a grudge on him years and years ago, have trouble in his joint.

Seth: Yes.

Gonzales: And, of course, these people have a grudge, too. If they didn't have a grudge, they wouldn't be in it. But because they have a grudge and they have trouble, and, of course, we hate—because of my nieces and nephews living the way they are—we hate to see Fidel live the way he is.

Sprinkle: Oh, I can see that, too. I felt really sorry for your sister-in-law over there at the Coroner's inquest, because it looked to me like, you

(Testimony of Austin W. Seth.)

know, it was a pretty fixed up deal as far as the witnesses were concerned. We didn't have no witnesses for the other side. Even our testimony, we had to testify to what we saw and what these people told us.

Gonzales: I got—I got about four witnesses already that were down there, but they called them up and told them not to do anything and threatened them if they do witness for him. [167]

Sprinkle: That's what makes it tough on us. As far as that is concerned, Fidel got——

Gonzales: And this boy, they are afraid to do that because they are afraid Fidel could do that because they don't got any money.

Sprinkle: Yes.

Gonzales: Because——

Sprinkle: Well, that can all be brought out in the trial, you know.

Seth: How much are these people involved then, Cecil and Giron? Are they——

Gonzales: Mr.—what is your name?

Seth: I am Sergeant Seth.

Gonzales: Well, of course, I will come to the clear now because I don't want to have any more beef. I've had enough now. I could make another statement, but you could break it down.

Seth: This statement here——

Sprinkle: What we want to do, Albert, is just state you now wish to make another statement; that the first one that you gave us was not true.

Gonzales: Because this might be against me, yes.

(Testimony of Austin W. Seth.)

Sprinkle: Yes, we want the truth. We're not going [168] to hold that against you. If you'll cooperate with us, we're not going to hold that statement against you.

Gonzales: But one thing—one thing I would like to ask, Sergeant, about those involved, you know, if possible——

Seth: Those involved?

Gonzales: Yes.

Sprinkle: Well, you'll help them by telling the truth, too.

Seth: You know, Albert, they are involved in this now, aren't they? Whether they had the major part of it or you did the job, it all depends on the statement you give us, whether it's true or not, see. If you clear them, why then they're out of it, you see.

Sprinkle: Tell us the exact truth, just the way it happened, and then let us decide who is to blame and let the court decide the punishment to each person. But I will say this, that each one of these people that tells us the exact truth, we will give an absolute 100 per cent recommendation.

Gonzales: But you can see down here out of my statement that I am protecting the other sides, too.

Seth: That's right.

Sprinkle: We realize that.

Gonzales: Because all these people have families. Like myself now, I went to visit my nephews just the other night before I went down there and gave them a good kiss and it just hurt inside of me.

(Testimony of Austin W. Seth.)

Sprinkle: That's right, I can see why that would happen, too.

Gonzales: I helped them a lot because their relief is not enough now.

Sprinkle: Yes. How long have you known the Girons?

Gonzales: Oh, not very long. I guess only about a couple of months.

Seth: How about Cecil?

Gonzales: Oh, Cecil, since '47. We went to Alaska.

Seth: Cecil worked out to the golf course out there?

Gonzales: Yes.

Sprinkle: Out at the Olympic. Well, I think what you should do, Albert, is go ahead and give us a statement, the exact truth, [170] how much each person is involved, and then we will get these people in and we will talk to them and get their statement and get them to tell the truth. They'll figure if you told the truth, they'll tell the truth, and that way it will look like you guys are trying to do the right thing; that you were afraid of him and that he left your sister-in-law a widow with three kids that are starving, aren't getting enough help from the relief, while he is driving around in a big Cadillac, has lots of money. But we certainly can't help if you don't tell us the truth.

Seth: Also, Albert, that he has threatened you. How many times has he threatened you?

Gonzales: Well, according to the boys, they al-

(Testimony of Austin W. Seth.)

ways tell me to watch out because he got a watch out for me all the time—I mean lookout for me all the time—because he figured if he don't get you, you might get him some of these days.

Seth: And you figured you better get him before [171] he got you?

Gonzales: I had to get him, sir.

Seth: You had to get him.

Sprinkle: Well, I think that is a good defense, Albert.

Gonzales: If he gets me, I got a lot of people lost.

Sprinkle: That's right.

Gonzales: If I got him, he got nothing to lose, he got a lot of money.

Sprinkle: That's right, his wife will get a lot of money.

Gonzales: I've been helping out before. I never have any record, I never have any squabble.

Sprinkle: That will go good for you.

Gonzales: I never had no trouble with anybody. Where I work I always have a good record.

Seth: Were you in town when your brother was killed?

Gonzales: Yes, I was in the house there, taking a bath.

Seth: Oh, you were here then?

Gonzales: I was here, but when I went down there, was all said and done. [172]

Seth: When did you start planning this?

Gonzales: Well, I started planning this about

(Testimony of Austin W. Seth.)

three months ago, because they had been following me.

Seth: Oh, they were following you at that time?

Gonzales: I know they had been following me, because himself following me. He followed me down Third and Yesler. I went to the grocery down there. His car was in the middle of the road, was parked in the middle of the road. I saw him and he saw me. But, of course, I didn't carry any gun with me. I didn't want to carry a gun because he suspicious of me I have a gun.

Seth: Yes.

Gonzales: But I know he always has a gun, because he was holding that—what you call that—the wheel like that, sitting like that, and his other hand like that. But I don't want to take a chance of going and say hello. I wanted to talk to him but I don't want—he has his hand inside of his pocket.

Seth: How long ago was this, Albert? [173]

Gonzales: A month—I think that was around between—I think that was around the 22nd of December.

Seth: Well, last night now, how long have these other fellows, have you taken them in with you on this deal?

Gonzales: Well——

Seth: They were afraid of him, too, you say?

Gonzales: Yes, they're afraid.

Seth: Has he threatened them?

Gonzales: Well, yes, they know that already. Any fellow that goes at my side, Fidel, some of his

(Testimony of Austin W. Seth.)

followers, will see, Fidel will have some of his followers talk to them. They will talk to them. That is why some of the fellows won't go around with me. I don't want them to go around with me because I don't want them to get suspicious.

Seth: They are afraid to go with us because they will get Fidel mad at them and he threatens them then. Now how was this planned last night? Did you plan it or did the others plan it with you?

Gonzales: Well, that Giron—Sergeant, you found [174] out that he rented a car?

Seth: Larson rented the car.

Gonzales: Larson?

Seth: Yes, Mrs. Giron and Larson rented the car. Do you know Larson?

Gonzales: White boy?

Seth: White boy.

Gonzales: Yes, I met the fellow once.

Seth: They rented the car.

Sprinkle: Mrs. Giron gave him the money, a hundred dollar bill.

Gonzales: Did she say that?

Seth: Yes.

Sprinkle: Yes.

Gonzales: Because I want you to tell me the truth about it.

Seth: Mrs. Giron went down with him and together they didn't have any money but a hundred dollar bill. She had the money, but they rented it in his name. He is a soldier at Fort Lewis out here. You say you have met him?

(Testimony of Austin W. Seth.)

Gonzales: Just once.

Seth: Yes. And they rented the car and then they brought it up there and you traded [175] cars, is that right?

Gonzales: What did Bill say—his name, this Larson, what did he say about the car?

Seth: Well, he said that Giron wanted to use it because it was smaller. He wanted to drive a smaller car last night.

Gonzales: Oh.

Seth: You see.

Gonzales: Well, that was a little bit suspicious.

Seth: Yes.

Gonzales: It happened that the car was stuck down there.

Seth: Uh huh.

Sprinkle: Well, you got up on the hill, didn't you, got up on the ice, didn't you, or slid into another car, didn't you?

Gonzales: Yes, he did. Then the car was stopped.

Seth: Who was driving it, Bill or you?

Gonzales: The other fellow.

Seth: Bill was driving it?

Gonzales: Yes. I don't know how to drive, sir. We stopped about a couple of blocks from the streetcar—I mean the bus. They didn't even run the motor any more because it stopped around there. So I [176] said, "How can we get back from here?" Then I said we had to change our plan. Of course, that is our plan then. I'm just telling you the truth now.

(Testimony of Austin W. Seth.)

Sprinkle: Glad to hear it.

Gonzales: I said we might as well cancel now because, see, this is bad luck because Fidel always has somebody with him all the time. And sometimes it is Philippino boys with him, sometimes Philippino boys drive the car. Sometimes they are in front—I mean sometimes they are behind Fidel—all the time.

Seth: Body guards?

Gonzales: Body guards, yes. And then the ones in his car, because we see him all the time. And then we says—well, then Giron or Cecil said something about, "Fidel must have a—" I don't remember it too well—something about, "Fidel must have a gun with him and we don't want to be caught sleeping."

Seth: Now, back to this—who provided the guns? Were any of those guns yours? How about the rifle, the 30-30. One of [177] the guns Giron bought. We know that.

Gonzales: Do you know that?

Seth: Yes, one of the shotguns.

Gonzales: What, the double barrel?

Seth: I think it was a single shot, I'm not sure. I haven't looked over the statement yet.

Sprinkle: Who had the 30-30 rifle?

Gonzales: Well, I'll tell you, that is me.

Sprinkle: That's you, you had the 30-30?

Gonzales: It was my brother's.

Seth: That's Max's?

Gonzales: Uh huh.

(Testimony of Austin W. Seth.)

Seth: And you are the one that used it?

Gonzales: That's a good question.

Sprinkle: Kind of tough to admit it, I know, Max—or Al—but I think you will find you will feel a lot better when we get this thing straightened away.

Gonzales: I couldn't do much to defend them because I am scared.

Sprinkle: Yes.

Seth: Did any of the others fire any shots, or just you, Albert?

Gonzales: We both fired. [178]

Seth: And Giron, you mean?

Gonzales: Giron, no, he didn't.

Sprinkle: Giron was driving?

Gonzales: He cannot fire, he was driving.

Seth: How about Larson? Was it Larson that fired or Cecil?

Sprinkle: Larson was with him? No, he wasn't with him. Who was the fourth man? Just the three of them?

Seth: Just the three of them.

Sprinkle: That is what I thought.

Gonzales: That's right, Sergeant Seth. I told the boys to get him to stay home because, well, he is going to get married soon.

Seth: Yes, but he knew about it? Larson knew about it?

Gonzales: Did he tell you about it?

Seth: He knew a little bit, not much. You kept quite a bit of it secret from him, didn't you?

(Testimony of Austin W. Seth.)

Gonzales: Well, he promised me that if I wanted him to go, he will do it just for me. Well, I told him about how my brother left the kids and this and that.

Seth: He is marrying this Evelyn, isn't he?

Gonzales: No, Shirley, from the other—Wisconsin.

Seth: Oh, Shirley?

Gonzales: Uh huh. So I told him, Bill, not to go, not to butt in, because that is not his business, anyway. Because, after all, I told him, he is going to get married pretty soon. I said, "Don't go yourself because—you don't have to go yourself."

Seth: Now how did you—did you wait there for Fidel to come home?

Gonzales: Yes.

Seth: When he came home, was he alone?

Gonzales: He happened to be alone at the time. It was the first time.

Sprinkle: Had you been out there before, Albert, waiting for him before?

Gonzales: Well, yes.

Sprinkle: Well, here's the thing——

Gonzales: Well, I want you to get me the straight. I don't want you to get mad at me.

Sprinkle: We're not going to get mad at you, and we want you to realize you have the right, you know, to tell your story or not to [180] tell your story. That's it, right?

Gonzales: I was interested in this, but—well, I think you seem to have a little understanding, I

(Testimony of Austin W. Seth.)

mean good understanding of me, and I have to rely, because I don't want to go around the bushes any more. I know you will find out anyway.

Seth: You had the rifle, Cecil had the shotgun, is that right?

Sprinkle: You want a drink or a smoke or anything?

Gonzales: No, thank you.

Sprinkle: You don't smoke?

Gonzales: I don't smoke.

Seth: You both fired. What would you have done if anybody had been there with him? Would you have shot it out anyway?

Gonzales: Well, if we see he is Philippino, we will get him, but if he is an American, we don't want to become—because he had an American fellow, but we didn't get him.

Seth: If there had been a Philippino boy there, you would have to kill him along with him, is that right?

Gonzales: Because we don't want to be complicated [181] with a white fellow.

Seth: Yes. How many shots do you think you fired yourself?

Gonzales: I know I fired only once. I know that I got him.

Seth: You know you got him with that one shot?

Gonzales: Yes.

Seth: How many times did Cecil fire?

Gonzales: I think just once, I guess.

(Testimony of Austin W. Seth.)

Seth: Just one?

Gonzales: Yes, because once I fired, I fired in the car.

Seth: Did Fidel fire any back?

Gonzales: I think he did.

Seth: You think he fired back at you?

Gonzales: Yes, I think he did, because Cecil mentioned, "I'm hit."

Seth: Cecil did, said, "I'm hit." What time was it about that Fidel came home?

Gonzales: I think is around 12:20, I guess.

Seth: About 12:20. And you were out there waiting at that time and you seen that he was alone. That's fine. Now what did you do, or what did Fidel do? Did he fall [182] to the ground or was he in his car?

Gonzales: He was in his car, he didn't fall to the ground.

Seth: He didn't fall to the ground?

Gonzales: He was in—I thought he was not hit, he was driving all along. He was driving all along to practically in front of his garage and I knew he was not hit, though I think, I don't know.

Seth: Were you in the car when you shot at him?

Gonzales: Yes.

Seth: And was the car moving?

Gonzales: Yes.

Seth: And then what happened after you did the shooting?

Gonzales: You mean when we shot him?

(Testimony of Austin W. Seth.)

Seth: Yes.

Gonzales: Well, when I shot him, his car, he was running his car the way—just like driving like he was not hit.

Seth: It kept going?

Gonzales: It kept going, just like he was not hit at all. And I think he shot, he back shot at us once or twice. [183]

Seth: You kept going, is that right?

Gonzales: That is right.

Seth: Bill kept driving the car?

Gonzales: Well, the car was stuck already.

Seth: And then you got stuck there?

Gonzales: And then I was so excited when I was going to have my second shot, it almost got me here.

Seth: You pulled the trigger when you——

Gonzales: I—yes, I almost got me.

Seth: You almost shot yourself?

Gonzales: I was so scared. That is because I hold this gun.

Seth: Now did you split up and run, or what happened then?

Gonzales: Well, of course, we run.

Sprinkle: Did you stay together or split up?

Gonzales: Oh, we split up.

Seth: What did you do with your gun?

Gonzales: Well, we threw it somewheres.

Seth: You threw it in the bushes there?

Gonzales: That's right.

Seth: Do you know what the other fellows did with the gun, the shotgun?

(Testimony of Austin W. Seth.)

Gonzales: No, I don't know, sir. [184]

Sprinkle: You haven't seen the other fellows since then?

Gonzales: Oh, no. I am delighted because I was numb. In a minute I was numb. I cannot move, you understand, I was so scared. You don't understand, you have been down there, why I was so scared.

Seth: You say this gun that you used was your brother's gun?

Gonzales: Well, I had been keeping that gun ever since.

Seth: Oh, ever since the murder, he was killed?

Gonzales: I didn't practice yet because there is no place to go around to practice.

Seth: How many shells did you take with you out there?

Gonzales: I got the box, let's see, about 12, 14 left.

Seth: How far away was you, Albert, when you shot at Fidel?

Gonzales: Oh, I think about this near. Of course, anybody that he don't know how to shoot a gun, it is impossible to judge.

Seth: Yes. How many feet would you say you [185] were away from Fidel?

Gonzales: About five.

Seth: Five feet away.

Gonzales: Yes.

Seth: His car drove that close to you?

Gonzales: Yes. He was this close to us. We was afraid that he might shoot us first.

(Testimony of Austin W. Seth.)

Sprinkle: Did he see you or recognize you or anything?

Gonzales: No, no.

Seth: You were only about five feet away from him?

Gonzales: That's right.

Seth: Then after that was all through, you say you split up and ran?

Gonzales: Yes, sir.

Seth: Your hands there, they have scratches on them. You got that from running through the bushes?

Gonzales: Oh, yes, we went around the bushes all the way through down there. I did know when I run this way the Prentice Avenue is only about block and a half. I was afraid because Prentice is the place where I walked right at the moment.

Seth: Then you caught a taxicab, is that right?

Gonzales: Yes, I did.

Seth: How far was that from where the shooting took place that you caught the cab? Just a guess?

Gonzales: Oh, I think about—about ten blocks, I guess. Of course, ten blocks I ran, close to a mile down there.

Seth: Now, Albert, will you give Detective Sprinkle here a statement? You just state that you wish to change your statement that you give on this original statement; that you gave this statement here to protect your friends; that, as you say, you

(Testimony of Austin W. Seth.)

weren't looking out for yourself, you were looking out for your friends; is that right?

Gonzales: Yes.

Seth: All right, Detective Sprinkle here will have to make out a new statement, and stay as close to the truth as you can, just as you recall what happened.

Gonzales: Im telling you the truth now.

Seth: Yes, we realize that, Albert. [187]

Gonzales: I cannot lie any more.

Seth: That's right.

Gonzales: If I lie now, then I will have to face it now.

Seth: That's right, that's right. I think you will feel a lot better off now that you're giving us the whole truth.

Gonzales: But one good thing about this case—I mean I——

Sprinkle: I, Albert Ayson Gonzales, now wish to change my original statement given to the police detectives when I was first arrested.

I have been afraid of Fidel Molina for sometime. Ever since he killed my brother last June. He has threatened to kill me several times. I have moved several times since June because I was afraid of Fidel Molina.

On December 22, 1949, I saw Fidel in his car. He had his hands on the wheel and when he saw me he put his hand inside his coat. I knew he carried a gun in a shoulder holster. I left immediately as I thought sure he was trying to get me. [188]

(Testimony of Austin W. Seth.)

I had to be careful of my friends because I knew Fidel would take it out on them if he knew they were friends of mine. People kept telling me I was in danger and I realized I would have to get Fidel before he got me. He kept forcing me to move and come into the open. I have been followed when I was on the street.

Two men I know, Bill Giron and Cecil Coluya, were also afraid that Fidel was after them, and they were also friends of my brother's. We talked it over and decided to band ourselves together against him. We figured it was either him or us.

Friday night, January 6th, Giron, Coluya and myself went out to Fidel's house in Rainier Valley. We went out in a rented car with Bill Giron driving. I was in front with Bill and Cecil Coluya was in the back seat. We had a 30-30 rifle and two shotguns with us. The 30-30 rifle belonged to my brother Max and I have had it since he was killed. One shotgun I have had for a long time and Giron had another shotgun. [189]

We arrived at Fidel's about five minutes after twelve midnight. We stopped about five blocks away from Fidel's house. We waited about ten or fifteen minutes and Fidel drove by us and we followed him in our car. We drove alongside of him and as we got even with him, I fired twice at Fidel with the 30-30 rifle and Cecil shot once with the shotgun. We drove on and Fidel's car came to a stop as if nothing had happened. I heard a shot. I knew he was shooting at us. Our car had stalled and Giron

(Testimony of Austin W. Seth.)

couldn't get it going. I stepped out of the car and stood in the middle of the street and emptied the rifle into—well, I got the "car," but I think it should be into——

Seth: "His car."

Sprinkle: Fidel's car. I then ran because I was afraid Fidel might have someone in his house to help him. I ran through some heavy brush, leaving the rifle in the brush. I came out on a paved street and hailed a cab. I was in the cab when the [190] police got me, or, rather, the cab stopped and turned me over to the police.

The reason I did not tell this true story when I was first arrested was because I was confused and wanted to protect my friends. After thinking the matter over and discussing it with the detectives, I decided that the truth was the best solution.

I have read the foregoing three and a half pages and find them to be a true statement given by myself to Detectives Don Sprinkle and Austin Seth, without promise or duress. I have read the foregoing three and a half pages.

All right, now, Albert, I wish you would read that over and anything you don't understand or anything you don't want in there or anything, just let us know. Just read it out aloud.

Gonzales: I, Albert Ayson Gonzales, now wish to change my original statement to the police detectives when I was first arrested.

I have been afraid of Fidel Molina [191] for sometime. Ever since he killed my brother last

(Testimony of Austin W. Seth.)

June. He has threatened to kill me several times. I have moved several times since June because I was afraid of Fidel Molina.

On December 22, 1949, I saw Fidel in his car. He had his hands on the wheel and when he saw me he put his hand inside his coat. I knew he carried a gun in a shoulder holster. I left immediately as I thought sure he was trying to get me.

I had to be careful of my friends because I knew Fidel would take it out on them if he knew they were friends of mine. People kept telling me I was in danger and I realized I would have to get Fidel before he got me. He kept forcing me to move and come into the open. I have been followed when I was on the street.

Two men I know, Bill Giron and Cecil—Cecil, this is Cecil.

Sprinkle: What was that?

Gonzales: Cecil.

Sprinkle: Oh, Cecil? What have I got?

Gonzales: C-e-c-i. [192]

Sprinkle: Oh, okay.

Gonzales: (Continuing) ——was also afraid that Fidel was after them and they were also friends —Sergeant, we should mention that Fidel was after them and they were also—Sergeant, we should mention that the ones we went out with were Cecil and Giron and some of Peter's friends, so us were together.

Sprinkle: Oh, I see. Well, we can add that on the bottom somewhere after you get through there.

(Testimony of Austin W. Seth.)

Go ahead and read it and then we will add it on the bottom.

Gonzales: (Continuing) ——also friends of my brother's, because friends of my brother where I got too much course.

Sprinkle: Yes.

Gonzales: They, too, are going together, we should go in together.

Sprinkle: Oh, all right. We'll put that at the end of the statement.

Gonzales: (Continuing) We talked it over and decided to band ourselves together against him. We figured it was either him or us. [193]

Friday night, January 6th, Giron, Coluya and myself went out to Fidel's house in Rainier Valley. We went out in a rented car with Bill Giron driving. I was in front with Bill and Cecil Coluya was in the back seat. We had a 30-30 rifle and two shotguns with us.

Can I change this, too?

Sprinkle: Yes, fine, change anything you want.

Gonzales: Okay.

Seth: That's fine.

Gonzales: (Continuing) The 30-30 rifle belonged to my brother Max and I have had it since he was killed. One shotgun I have had for a long time and Giron had another shotgun.

Well, he didn't got that. I don't know whether he owned that one or not. Did you say something that Giron had got one?

Seth: Yes, yes, he bought it.

(Testimony of Austin W. Seth.)

Gonzales: Oh.

Sprinkle: Well, you don't know where he got it?

Gonzales: No.

Sprinkle: How did you know the gun got in the car? [194] You didn't bring it, did you?

Gonzales: No.

Sprinkle: Cecil didn't bring it?

Gonzales: And did you find out that Bill—I mean Giron—bought that gun?

Seth: He bought it in a hock shop downtown.

Gonzales: Oh, he did?

Seth: That's the information we have.

Sprinkle: Of course, if you don't want to put that in there, we'll just cross it out. Because if you don't know—I thought you knew—we don't want to put in anything that you don't know, see. So we'll just say that—let's see—"one shotgun I had a long time," and then we'll cross out this. "I don't know where the other one came from." How's that?

Gonzales: That is all right. Then you can ask them where they got it, because I don't want them to think I was trying to spill something on them.

Sprinkle: Yes. Well, you read that over there, then, where I marked it out.

Gonzales: One I had a long time and I don't know where the other one came from. [195]

We arrived at Fidel's house about five minutes after twelve midnight. We stopped about five blocks away from Fidel's house. We waited about ten or fifteen minutes and Fidel drove by us and we followed him in our car. We drove alongside of him

(Testimony of Austin W. Seth.)

and as we got even with him, I fired twice at Fidel with the 30-30 rifle and Cecil shot once with the shotgun. We drove on and Fidel's car came to a stop as if nothing had happened. I heard a shot. I knew he was shooting at us. Our car had stalled and Giron couldn't get it going. I stepped out of the car and stood in the middle of the street and emptied the rifle into Fidel's car. I then ran because I was afraid Fidel might have someone in his house to help him. I ran through some heavy brush, leaving the rifle in the brush. I came out on a paved street and hailed a cab. I was in the cab when the police got me, or, rather, the cab stopped and turned me over to the police.

The reason I did not tell this true [196] story when I was first arrested was because I was confused and wanted to protect my friends. After thinking the matter over and discussing it with the detectives, I decided that the truth was the best solution.

I have read the foregoing three and a half pages and find them to be a true statement given by myself to Detectives Don Sprinkle and Austin Seth, without promise or dur——

Seth: Duress, that's duress.

Gonzales: ——duress. I have read the foregoing three and a half pages.

Sprinkle: Now is there anything else you wanted to add at the bottom? How was that now?

Seth: There was something you wanted to add, something you didn't like.

(Testimony of Austin W. Seth.)

Sprinkle: I have forgotten now, we had so much here.

Gonzales: Let's see——

Sprinkle: What was it we were going to add? Oh, that about your brother, that Fidel had seen you.

Gonzales: Oh, yes, that's right. [197]

Sprinkle: That Fidel had seen—oh, yes, that these——

Gonzales: That's right, that's right.

Sprinkle: One of the main reasons that Giron and Coluya were—how will we put it—were with you in this—is that it?

Gonzales: Wait a minute—the reason that Giron and Coluya were——

Seth: Were in trouble with Fidel was because they were seen with you.

Gonzales: That's right. Giron did not arrive home yet, huh?

Seth: No.

Gonzales: You see, it is just that they are guilty.

Seth: Yes.

Gonzales: You say it won't do them any good to run?

Seth: It's just going to be tougher on them.

Gonzales: Even if they didn't catch me, I couldn't escape on that.

Seth: Yes.

Gonzales: But to them, they'll still be complicated.

Seth: That's right.

(Testimony of Austin W. Seth.)

Gonzales: I knew they would get me, because——

Sprinkle: Yes, we have that on there now. Now what I want you to do is to sign it right on that line there, if you will. That's it. Now any place that we have crossed out or anything, I want you to initial it so that—let's see—that one is all right. Sign it right on this line where it says sign.

Gonzales: Rudy was here last night and they released him in about five minutes.

Sprinkle: Brought him in because he had that gun, but he has got a permit for it so we had to turn him loose.

Now on this here crossed out, just put your initials right there, Albert.

(Which concluded the transcription of the said recording.) [199]

The Court: You have some other questions, I believe you said?

Mr. Dimmick: Yes, your Honor, not very much.

Direct Examination—(Continued)

Q. (By Mr. Dimmick): Now any conversation that was had with Albert here and yourself and Sprinkle, is all of it detailed, all of your dealings with Gonzales detailed on that record, except for that portion of the time when Sprinkle was writing out the confession?

A. Yes and, like I say, the first two, three or four minutes, somewhere in there.

Q. Now did you continue on in this investiga-

(Testimony of Austin W. Seth.)

tion in connection with the other two parties who had been implicated?

A. Yes, sir. Immediately after this confession, I contacted several other police officers, the Safe Squad, Thomas and Ryan, and requested them to come along with us in making another arrest. At approximately 3 a.m. on the morning of the 8th we arrested defendant Coluya at his home. I believe it is about 415 Broadway, somewhere around there.

Q. Did you interrogate Coluya at all? [200]

A. Yes, I questioned him for, oh, four or five minutes, and he stated flatly he refused to talk until he had talked to Mr. Beardsley.

Q. Mr. Beardsley is his lawyer or was going to represent him? A. Yes, sir.

Q. And, in fact, did represent him at the proceedings where these men were convicted?

A. Yes, sir.

Q. And, in other words, that is all you ever got out of Coluya? A. That is true, sir.

Q. How about Giron?

A. Giron did not show up until the 9th.

Q. Let's go back. Are you familiar with this business of Giron's wife having been arrested?

A. Yes, not any connection with it myself, but I am familiar with the case, some parts of it.

Q. What do you know about her arrest?

A. Well, we had a young soldier, I believe it was a Paratrooper, in and he implicated Mrs. Giron and——

(Testimony of Austin W. Seth.)

Q. Was he the soldier who was mentioned on the wire recording?

A. On the wire recording. And he implicated himself and Mrs. Giron as renting the particular car that was used [201] in this deal that night, and I believe the officers arrested her for that reason. She was later released after investigation.

Q. All right, now, was she released before Giron was arrested or brought in, or how did that come about?

A. I'm not sure, I believe she was released before, but I'm not sure about that.

Q. You are not sure? A. No, sir.

Q. Do you know the circumstances surrounding Giron's being taken into custody?

A. I know that we could not locate him. Sprinkle and I made attempts to locate him and the men originally assigned to the case, Kirshner and Waite, made many attempts to locate him. Finally, contacted Mr. Beardsley on numerous occasions and the final time he said he would have his client in there Monday morning.

Q. Mr. Beardsley contacted the police department and told the police department that he would have Giron and bring him in Monday morning?

A. That is true, sir.

Q. And when did he turn in?

A. I believe it was—yes, it was on Monday. I'm not sure whether it was Monday morning or just what time it was, but I see in the statement, "Booked on the 9th," which [202] would be Monday.

(Testimony of Austin W. Seth.)

Q. And he came in with his attorney at the time?

A. I understand that he did, sir.

Q. Did that end your investigation of this case, do you remember?

A. Oh, I have had several things. We went out to the scene, took pictures there, various pictures I took following that, but that is about all. I had no connection other than with Giron or Coluya, or Gonzales, for that matter, after the statement.

Q. Now as I remember the thing, Gonzales was picked up very early Saturday morning and actually he was in custody over the week end, during which time he gave or made these two statements?

A. That is true, sir.

Q. And then do you know of your own knowledge when he was able to retain counsel?

A. No, I do not know.

Q. This Vertres of whom you spoke, is that John C. Vertres?

A. I don't know. Vertres is a young attorney, was——

Q. Blond boy, wasn't he, in the prosecutor's office? A. Real blond.

Q. He was in the prosecutor's office at that time?

A. Yes, that's right.

Q. He was actually working for the prosecuting attorney at [203] the time of this shooting?

A. I don't know if he was working for him or

(Testimony of Austin W. Seth.)

had just quit the prosecutor's office. I'm not sure.

Mr. Dimmick: I have no more questions.

Cross Examination

Q. (By Mr. Etter): As I follow your recording, Officer Seth, there is approximately a little bit in excess of thirteen and a half minutes of your recording that has to do with the interrogation prior to the time that Officer Sprinkle started to take down or write out or compose the confession; is that correct? A. I don't know.

Q. Hadn't you ever checked it to find out?

A. No, I never have.

Q. Would that be a reasonable estimate, do you think?

A. I don't know, sir, I couldn't tell you. The only way to do it would be to check it.

Q. Isn't the greater part of the record, approximately 20 minutes or more, devoted to the reading of the confession by Mr. Sprinkle and then the rereading of it by Mr. Gonzales? Did you notice that when you were playing it?

A. No, I didn't. Like I say, I didn't pay particular [204] attention to the time.

Q. Would it be a fair assumption, Mr. Seth, that the record player that you have here was turned off at least two hours during the interrogation and discussion with Mr. Gonzales?

A. I don't believe it took that long to take that statement. An hour, hour and a half.

Q. Beg pardon?

(Testimony of Austin W. Seth.)

A. Hour to an hour and a half. It could be two hours, but I don't believe it took that long to take a three and a half page statement, although we did have difficulty in understanding, and so on, back and forth.

Q. Well, you started this machine at approximately 11:30, isn't that right?

A. Somewhere around there.

Q. And the confession, you finished the confession at approximately 2:10 the following morning?

A. Yes.

Q. That is approximately two hours and 40 minutes. A. We signed it at 2:10.

Q. Yes. Right after this last statement of his, isn't that correct?

A. Yes, how long it took to sign it. It may have been 5, 10, 15 minutes, but nothing more than that.

Q. All right, assume it was 10 minutes and that you [205] finished at 2 o'clock, it took 10 minutes to get the signature on there; there is almost two hours, is there not, from 11:30?

A. That's right.

Q. And this machine, as I time it, is just short of 35 minutes. A. 35 minutes?

A. This recording. Now isn't it fair to assume that there was questioning and discussion going on for some actual two hours during that period of time?

A. That must be it then, sir. Like I say, I have never timed it.

Q. Correct. It is a fact, is it not, that no call

(Testimony of Austin W. Seth.)

was made to any attorney of Mr. Gonzales until after he signed a confession?

A. I believe that a call was made to Mr. Vertres prior to that.

Q. Do you know that it was?

A. We put in three or four calls to Mr. Vertres.

Q. When did you, yourself, put one in, if you made it?

A. About—I got hold of him about 2:30, but I'm pretty sure that Detective Sprinkle called him before midnight.

Q. Were you there? Do you know that Detective Sprinkle called him?

A. I know that he told me he had made a call and I know [206] that the defendant here also made a call. I don't know whether defendant made a call before or after. I got hold of Vertres about 2:30.

Q. Well, when you two officers were assigned to this case, I would assume it would be approximately just shortly before 10:30, is that correct, on the night of the 7th?

A. Somewhere around there, yes, within a half hour one way or the other.

Q. And you were assigned by what superior officer?

Mr. Dimmick: Just a minute. Did you say assigned to the case at 10:30 on the 7th? Yes, that's right, okay.

A. Yes.

Mr. Dimmick: 10:30 p.m.

(Testimony of Austin W. Seth.)

Mr. Etter: 10:30 p.m. on the 7th, yes.

Q. That would be Saturday, 10:30 Saturday evening, Saturday night?

A. Yes, that would be Saturday night.

Q. What superior officer assigned you to that case? A. I don't recall.

Q. Beg pardon?

A. I don't recall who assigned it. It could be Sergeant O'Mara. I don't know just who was on the shift.

Q. Did you have any discussion about the case with the officer that assigned it to you before you began the questioning at 10:30 or 11:30 that evening; that is, the [207] evening of the 7th?

A. Yes.

Q. Who did you talk to?

A. I believe somewhere—this is two years ago, I can't just recall it—but we discussed with somebody there the details of the case or what was known of it, and it was Sergeant O'Mara. He suggested or we suggested that we be allowed to talk to Albert Gonzales because of knowing some of the background and his brother.

Q. You knew, did you not, that he had been arrested in the morning, he had been arrested at approximately 1:30 or thereabouts?

A. Yes, I knew that.

Q. And knew that he had given a statement at approximately 5 o'clock on Saturday morning?

A. Yes.

(Testimony of Austin W. Seth.)

Q. And you read the statement, I assume?

A. I read it.

Q. And did you discuss it with any of the police officers? A. I believe I did.

Q. You did? A. Yes.

Q. And did you make any comment about this statement?

A. Yes, I didn't believe it was the whole story.

Q. I see. When did you first talk with any police officer [208] about this statement?

A. I don't know. It must have been around that 10, 10:30 period, somewhere in there.

Q. Did any of the officers that talked to you, Sergeant O'Mara or anybody in command at the police station, tell you about any discussions they had had with the Petitioner Gonzales following his arrest and detention at the central police station at approximately 1:30 on the morning of the 7th?

A. Not that I recall.

Q. Didn't discuss any questioning?

A. I can't recall it. It is possible.

Q. Did you discuss this statement with Paul Foster, I think is his name, that appears here?

A. Sergeant Foster? I don't believe so, because Sergeant Foster was on the midnight shift and I don't believe Sergeant Foster would have been there yet at that time, or if he come down early, it is possible that I talked with him, but I'm not sure.

Q. Do you know or were you advised that any request had been made for counsel during Saturday morning or Saturday afternoon?

(Testimony of Austin W. Seth.)

A. No, I was not.

Q. You were not. And the first thing you know about it is Saturday night, is that correct? [209]

A. That is true.

Q. When he asked to see his lawyer, did you ask him if he had made any inquiry during Saturday? Did you discuss that with him?

A. Not that I recall.

Q. You did not?

A. Not that I recall. I don't know.

Q. Then you say that the first time that he discussed the matter of being abused or assaulted or threatened was after you had this statement, is that it?

A. Yes, the following day, I believe it would be.

Q. I see. And that was made to you?

A. No, it was not made to me, it was made to, I believe, Sergeant O'Mara, or somebody got that statement from the jail and, like I say, I can't give you a definite answer on it, but it did not come directly from Albert Gonzales to me.

Q. It did not?

A. But as soon as I heard of it, I requested the examination.

Q. I see. And you don't recall that any statement was made to you? A. No, I don't recall it.

Q. Did you have a picture taken? A. I took it.

Q. You took the picture? A. Yes.

Q. Have you got the picture?

A. It is in the court records.

Q. I see. And the picture you took was a picture,

(Testimony of Austin W. Seth.)

was it not, of Gonzales stripped to the waist and from the waist up?

A. No, no, I think he just had on his shorts.

Q. You didn't take any picture of his groin, did you?

A. I took about four pictures. I'm not sure, I believe I did.

Q. When did you take the pictures?

A. Right after the examination.

Q. Right after the examination? A. Yes.

Q. And at the time you took the pictures, did you talk with Gonzales about any injuries that he claimed he sustained? Did you talk with him at that time?

A. I probably did. I can't recall any details.

Q. What did you tell him you were taking the pictures for?

A. To show if there was any marks.

Q. Any marks? A. That is true.

Q. You mean, then, you discussed it with him?

A. No, I don't believe I did. There was Detective Sprinkle, [211] Detective Johnson and several others there when I took those pictures. I just took the pictures.

Q. I know, but do you mean to say that you just walked down and took this man up and said, "We're going to take some pictures?"

A. Yes.

Q. Is that right? A. That is, probably.

Q. Didn't tell him why?

A. Yes, I probably explained why.

(Testimony of Austin W. Seth.)

Q. What did he say? A. I don't recall.

Q. Well, did he name anybody as having assaulted him?

A. No, he did not name anybody to me at all.

Q. I see. What did he say then about being hurt?

A. He said—wait a minute now—I can't recall the exact conversation, but he claimed that he had been struck.

Q. He had been struck by whom, did he say?

A. He didn't tell me.

Q. Didn't tell you? A. No, sir.

Q. Did the police make any further investigation at the Police Department to determine whether or not any officer had struck him?

A. I did not. [212]

Q. Did anybody else that you know of?

A. I understand the Chief of Detectives had a line-up of the detectives. I was not present, neither was Detective Sprinkle, at that line-up.

Q. I see. And a line-up, is that the time that Mr. Gonzales and his attorney attempted to pick out one of the men who he claimed had assaulted him? A. Yes, I understand they did.

Q. Mr. Thomas wasn't there at that line-up, either, was he?

A. I don't know, I was not there.

Q. So you had no discussion about the purpose of the pictures other than to say, "We're going to take these pictures of you?"

A. That is, I believe to be true.

Q. You didn't talk with him at that time about

(Testimony of Austin W. Seth.)

the statement that you had received from him? You didn't inquire about it?

A. If I can state this, I do believe that Detective Sprinkle asked him why he hadn't discussed this with us.

Q. I see. Did Detective Sprinkle discuss that in your presence with Gonzales?

A. Yes, I believe it was.

Q. On the day——

A. While I was taking the pictures.

Q. While you were taking the pictures? [213]

A. Yes.

Q. Who else was present?

A. I believe a Detective Chet Johnson and I believe Sergeant O'Mara and a Dr. Brown.

Q. All right. And when Detective Sprinkle said, "Why didn't you mention that to us when we were talking with you?" What did Mr. Gonzales say to that? A. I don't recall.

Q. Were you advised at all when you were assigned to this case of any interrogation that had previously been made or taken of the petitioner Gonzales? Had you been advised of all of the events in relation to him that had transpired since he was arrested, or not?

A. I had been advised that a statement was taken at 5 o'clock.

Q. I see.

A. That morning. Or taken or signed at 5, I don't know, somewhere in that vicinity.

Q. I see. And you examined it, is that right?

(Testimony of Austin W. Seth.)

A. I read it over, yes.

Q. And were not satisfied with it?

A. No, sir.

Q. And decided that you would take another one, is that it? A. That's right.

Q. Did you discuss this statement prior to the time that [214] you started your recording?

A. Probably did, referred to it. I don't know about discussing it at any length.

Q. After this second statement was given, do you know whether or not Gonzales was taken down in an automobile by any of the detectives for the purpose of taking him up to Giron's house?

A. The first I heard of that was right in the courtroom here, so I did not hear.

Q. Do you know whether that occurred or not?

A. I do not know of any such happening.

Q. I see, you do not know, all right. You had nothing further then, I assume, to do with the questioning or the investigation after that time?

A. Several minor details. I went out to the scene and looked for the guns and looked for bullet holes in the telephone poles and things.

Mr. Dimmick: If I may for the record, that alleged ride that he took was immediately after giving the first statement at 5 a.m., not after the second statement.

Mr. Etter: Well, maybe it was a mistake. I will inquire whether or not he knew whether he was taken for a ride up to Giron's house at any time after the first or the second statement?

(Testimony of Austin W. Seth.)

A. No, sir, I do not. [215]

Q. That you know about? A. No, sir.

Mr. Etter: That is all.

The Court: Any other questions?

Mr. Dimmick: That is all.

The Court: That is all.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Dimmick: Now I believe that in the affidavits of Coluya and Giron, one of the issues that was raised was whether or not in instructing the jury the confession and all was taken into consideration in the determination of the jury.

Now I have here certified copies of the instructions given by James W. Hodson, Judge, in the Superior Court of the State of Washington for King County, in State of Washington vs. Albert Gonzales, William Giron and Cecil Coluya.

The Court: That is a certified copy?

Mr. Dimmick: Yes, your Honor.

The Court: Have you seen this, Mr. Etter?

Mr. Etter: No, I haven't seen any of it. I don't know that the instructions are material to this inquiry. They may be.

Mr. Dimmick: That was raised the last time, most assuredly, or I wouldn't have taken the trouble to bring them in. [216]

The Court: They might be. I presume there is an instruction in there that instructs the jury that the confession of Gonzales is to be considered as evidence only against him and not against the other

defendants named in it. Is there an instruction of that kind in there?

Mr. Dimmick: Yes, your Honor. Particularly, I think it is Instructions 12, 13, 14 and 15.

The Clerk: Marked as Respondent's Exhibit 7 for identification.

The Court: This wire recording has now been incorporated in the record and I see no reason why you shouldn't just take that with you and take it back. There would be no occasion for keeping it here any longer, and I suggest that it simply be withdrawn and you take it with you. We have its contents in the record, anyway.

Mr. Seth: All right, sir, thank you.

The Court: Perhaps I should show I was addressing these last remarks to Sergeant Seth.

Mr. Dimmick: Well, I will request the Court that the wire recording used in the proceeding——

The Court: I have just told Sergeant Seth to take it, that we wouldn't require it any longer here, and this will be admitted. What exhibit number is that?

The Clerk: Respondent's No. 7, your Honor.

The Court: All right. [217]

(Whereupon, the instructions referred to hereinbefore were admitted in evidence as Respondent's Exhibit No. 7.)

Mr. Dimmick: That is all the witnesses.

The Court: All right, I will hear your argument, then. Do you have any further testimony?

Mr. Etter: I just want to ask one question of the Sergeant.

AUSTIN W. SETH

having previously been duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Etter): After the confessions were secured, was it then that the arrests were made of both Coluya and Giron?

A. Yes, it was after.

Q. It was after that? A. That's right.

Mr. Etter: All right.

(Witness excused.)

The Court: All right, I will hear your argument.

(Whereupon, oral argument was made to the Court by counsel for the respective parties.)

The Court: Well, I will take this under advisement. [218] I will not ask you to submit briefs because I have a pretty good card index on habeas corpus. I think I have most of the decisions where I can get them out of briefs.

Mr. Etter: May we submit authorities if we find some that would be helpful?

The Court: Yes, either of you. I will be back in Spokane, I think, in about ten days and I intend to dispose of it very promptly after that. But if at any time within the next ten days or so you think of some authorities or have some you wish to submit, just put them on an informal list or a letter and give counsel a copy.

Mr. Etter: Fine.

The Court: Either one of you may do that.

(Whereupon, the hearing in the above cause was adjourned.) [219]

Yakima, Wash., Dec. 17, 1953, 10:00 o'clock a.m.

(Pursuant to the filing of the written opinion of the Court on October 14, 1953, in the above matter, and the amendment thereto filed on December 7, 1953, a petition for re-argument was filed on December 15, 1953, and the following proceedings were had, to-wit:)

The Court: Now Gonzales against John R. Cranor.

I think I should have some clarification here of the rather unusual situation that has developed before we proceed with the argument.

The opinion which I filed sometime ago was criticized rather severely in the Seattle Post-Intelligencer, both in the news columns and in editorials. Then Mr. Alfred Schweppe, an attorney of Seattle, Washington, whom I have known for a great many years, I was on the Judicial Conference of the State of Washington with him many years ago, and I understand that not very long ago he made a study of the problems that arise in connection with these numerous petitions for habeas corpus by state prisoners, both to the state courts and to the Federal courts, he thought that the editorial staff of the Post-Intelligencer and some of the people who have been interviewed and whose opinions have been published in the Post-Intelligencer have

the wrong [220] conception of the powers and duties of the Federal District Court.

Where a petition is presented by a state prisoner, the Post-Intelligencer and the people whom they interviewed took the position that I had acted without jurisdiction, without authority.

I had thought that the case was ripe for consideration on the merits and decided it on the merits.

I am explaining all this leading up to the development that in this exchange of correspondence between Mr. Schweppe and the Post-Intelligencer —I didn't state, I believe, that Mr. Schweppe with a very commendable public spirit wrote to the Post-Intelligencer pointing out where he thought they were in error in their conclusions as to my powers and duties. He did it purely for public spirited motives. He has no interest in the case whatsoever and simply felt it was his duty as an attorney to come to the defense of the Court, which he thought had been improperly criticized and inaccurately criticized, perhaps.

In the correspondence which followed between Mr. Schweppe and the attorneys for the Post-Intelligencer, Tanner, Garvin & Ashley, Mr. Ashley directed a letter to me. I might say that after this exchange back and forth, they finally came out with the principal remaining contention of the Post-Intelligencer and its attorneys that Gonzales [221] had not exhausted his remedies in the courts of the state, as required by the Federal statute, because he had not perfected an appeal from his con-

viction in the Superior Court of the State of Washington for King County.

Now Mr. Ashley, of the firm of Tanner, Garvin & Ashley, wrote to me about that issue, and I will say, in justice to him, that he didn't show the slightest disposition or intention of improperly influencing the Court. I don't think it occurred to him that the case was still pending and that my findings and conclusions and final order had not yet been signed. But I thought that in view of the posture of the case, it not having been finally decided, that I shouldn't enter into a discussion with him about possible issues that might come up on motion for rehearing.

So I directed a letter to the attorneys on both sides here, calling their attention to the fact that these contentions were made as to my jurisdiction and as to the exhaustion of state remedies, and suggested that perhaps it might be well to argue or discuss it here. It is a matter of considerable importance to this Court, because I get a great many of these applications and I think, although I haven't checked up statistically, that probably more than half of them have not appealed to the State Supreme Court from their conviction in the state court, so that if that bars them from coming into Federal Court, I am doing a lot [222] of work for nothing and bringing the Assistant Attorney General over to Walla Walla many times when it wouldn't be necessary, if I need not consider cases where no appeal has been taken from the state con-

viction. I don't think that that is tenable, but I will hear from counsel about it.

Now I invited the attorneys for the P.I. in this situation to appear, if they cared to, as Amicus Curiae. Mr. Ashley wrote to me declining to do so as he thought it wouldn't be wise or advisable in the circumstances, but I did get a letter from the firm of Rummel, Griffin & Short of Seattle, who asked to appear Amicus Curiae at the request of Judge Hodson. Judge Hodson was the judge who presided in the state court trial of Gonzales and his co-defendants. So that I have an appearance here by the firm of Rummel, Griffin & Short, appearing at the request of the state court judge. They have filed a brief and I am not sure whether they are appearing in person or not. Is anybody here representing the firm of Rummel, Griffin & Short?

Mr. Short: Yes, I am Kenneth Short, I am appearing on behalf of Amicus Curiae.

The Court: All right. Mr. Etter?

Mr. Etter: Your Honor, may I interject before we get underway, we have all had some correspondence apparently on this matter. I had some with the Dean of the University [223] of Washington Law School, who apparently called Judge Hodson and discussed my correspondence with him and then wrote me back a letter. There are a couple of things that I think ought to be cleared up before we start.

In the first place, the Dean took the position over there that we couldn't confer jurisdiction on the Court by stipulation, and I think that we can

all agree that neither Mr. Dimmick or Mr. Eastvold or I or any other adverse parties can confer jurisdiction by a simple statement that we stipulate that the Court may decide it.

But the issue here wasn't that, in my opinion, it was the stipulation of facts from which the Court could find jurisdiction.

Then Judge Hodson indicated that he didn't believe, but he was going to check the record to find out, that Mr. Gonzales had ever applied in the Supreme Court of the State of Washington for a writ of habeas corpus, and so it presents the same things that we thought were settled by the stipulation.

So inasmuch as the Court had not entered its findings or conclusions, I sent to the Clerk of the Supreme Court and I have received from him and I would like to introduce as part of the record the certified copies, under the seal of the Supreme Court, of all the proceedings in the Supreme Court of the State of Washington, which show the [224] motion and notice of appeal, the order denying it —that is on the matter of habeas corpus—and then the order of the Supreme Court of the United States denying certiorari, which are now on file in this cause, with the Court's permission, just so there will be no misunderstanding about that.

I would like to let Mr. Dimmick, if he wishes, examine it and have it marked and put it in as an exhibit so that we can get that matter determined.

The Court: Have you any objection to that?

Mr. Dimmick: As a matter of fact, I am very happy to concur. The tenor of the letters—I have

had very little correspondence with anyone in connection with this case for obvious reasons——

The Court: May I make it clear at the outset that the Attorney General has not engaged in any of this newspaper controversy at all. I am not inferring that in the slightest way.

Mr. Dimmick: I know, but the newspaper inferred that the Attorney General was a nincompoop, and that may be true——

The Court: The only thing I saw was that the Attorney General stated that he intended to appeal if the order stood, and I assumed that is what you would do. I think the case ought to be appealed. I want a ruling from the Court of Appeals on the question if my final decision is as set [225] out in the opinion.

Mr. Dimmick: The inference was, of course, we never protested this business of the Court assuming jurisdiction.

I want to say that this stipulation that Mr. Etter and I signed was a stipulation to only one thing, and that was that the petitioners had applied to the Supreme Court of the State of Washington for a writ of habeas corpus, which had been denied; that they had subsequently applied for certiorari to the Supreme Court of the United States, which had been denied. Period. That's all that we ever stipulated to, there never was any stipulation as to anything else, and I might say that my files, up to the time of the conclusion of the article that was written, to my knowledge have never been even looked at. So——

The Court: Well, I think to use an excess of caution, if I may put it that way, I think the documents should be received and they will be admitted in evidence. What is the next number?

Mr. Etter: Mr. Dimmick is entirely correct, all we have done is stipulate to certain facts.

Mr. Dimmick: I am familiar with this.

Mr. Etter: That is correct, and we filed that.

The Court: I might say the reason I use the term "excess of caution," there are two reasons why I think your stipulation was all right and the Court was justified in [226] acting upon it: One is it isn't a stipulation of jurisdiction; it is merely a stipulation of fact; and I think it is commendable for counsel to stipulate and avoid the expense and trouble of getting certified copies where there is no question but what the petitioner did petition the State Supreme Court for habeas corpus and then applied for certiorari to the United States Supreme Court. So it wasn't a stipulation of jurisdiction, but a stipulation of fact.

Another thing, I don't think that this requirement that a state prisoner exhaust his remedies in the state court is jurisdictional. It is not a jurisdictional requirement, but is merely a statutory requirement that is set out in the act of Congress which gives the Federal Court power and jurisdiction to try these petitions from state prisoners, and it is a statutory direction and requirement that is for the sake of keeping good relations between the state and Federal Court, a matter of comity.

But, at any rate, we will nail down on it by admitting this exhibit in evidence.

I think before we proceed here we should have some understanding about the time. I got a little behind on my calendar and have two cases set for this afternoon, one to complete for argument and another to begin. What is your idea about the amount of time that you think you should have, Mr. Dimmick? [227]

Mr. Dimmick: I am assuming that you are going to allow my argument on the request that I sent over, request for re-argument, and I want to state that under the authority of Partridge vs. Crespey, 189 Federal (2d), 645, that it also can be considered as a motion for a new trial at this time, although the order is not signed.

The Court: I thought that the logical order in which to take up these matters would be first the motion for re-argument or for rehearing or for new trial, whatever you may designate it, and then take up the matter of settling the findings.

Mr. Dimmick: Yes.

The Court: And you have no objection to that, Mr. Etter, I presume?

Mr. Etter: None.

The Court: And you will not raise the question as to whether the motion should be made before or after the findings are signed?

Mr. Etter: Not a bit.

(Whereupon, after further colloquy between Court and counsel, arguments were made to the Court by Mr. Short, Mr. Dimmick and Mr. Etter, and the following oral opinion was rendered by the Court:) [228]

Oral Opinion of the Court

The Court: Well, gentlemen, I sincerely appreciate your assistance in these matters. I appreciate Mr. Short's firm participating and his making a very lawyer-like argument, that he is here as a friend of the Court.

I have already stated my conclusion on the merits, and it is further my conclusion that there was here an exhaustion of state remedies. I think that I should hold that because of the decisions of the Ninth Circuit Court of Appeals here, cases cited by Mr. Schweppe's letter—I understand he sent you gentlemen copies of it, did he not? That is, you got a copy of it, Mr. Etter?

Mr. Etter: Well, I had left before it came, but Mr. Short had it this morning and I think he sent me one.

The Court: In the copy he sent to me, he said he had sent it to all the people I had addressed, which would include you gentlemen, attorneys on both sides of this case.

"Even in Justice Reed's opinion in Brown vs. Allen," and I am reading now from brief of Amicus

Curiaea,

"there is this statement,"

which I agree with Mr. Schweppe applies to this case. The statement is:

> " 'Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because [229] of lack of counsel, incapacity, or some interference by officials."

And:

> " 'Also, this Court will review state habeas corpus proceedings, even though no appeal was taken, if the state treated habeas corpus as permissible. Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings. Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.' "

I think here where there has been habeas corpus, which it is conceded by all, habeas corpus application to the State Supreme Court, which it is conceded by everybody, apparently, that Gonzales had the right to carry on in this case, and that that habeas corpus results in a denial of the petition and he petitions for certiorari to the United States Supreme Court and that is denied, that he has then exhausted his state remedies, and the Federal District Court, under the governing statute, properly may consider and pass upon his petition to the Federal Court.

Now I don't like to unduly emphasize this Brown [230] vs. Allen, but that case is particularly apt here, I think, because in Brown vs. Allen the opinion covers about 116 pages—don't be alarmed, I'm not going to read it all—but in that case two different Justices of the United States Supreme Court undertook to lay down the rules by which Federal District Courts should be governed in passing upon applications to the Federal Courts for habeas corpus by state prisoners. Mr. Justice Reed wrote one of the opinions of the Court; Mr. Justice Frankfurter wrote another; and he wasn't altogether satisfied with Justice Reed's exposition of the gospel so he said he was going to add to it and give it a little more detail and be a little more explicit.

So here we have the highest Court in the Federal system talking directly to the lowest Court. We have here the General talking to the privates in the ranks telling them what they should do. I am the private and, of course, in this Federal Court army the Supreme Court is the General, the Justices of the Supreme Court.

Now I think it is particularly appropriate to read at some length from this opinion because Mr. Justice Frankfurter deals with this whole problem that has been brought out here and concerning which I think the Seattle Post-Intelligencer and the people it interviewed over there showed an amazing lack of understanding and knowledge [231] concerning just what the duties of a Federal District Court are in these matters, and for that reason I will quote at some length from this opinion, be-

ginning on Page 497 of the United States Report, which is Volume 344 of the United States Reports. I will try not to go over again the ground covered by Mr. Etter in his argument in quoting from this opinion. But Mr. Justice Frankfurter says:

"I deem it appropriate to begin by making explicit some basic considerations underlying the federal habeas corpus jurisdiction. Experience may be summoned to support the belief that most claims in these attempts to obtain review of State convictions are without merit. Presumably they are adequately dealt with in the States courts. Again, no one can feel more strongly than I do that a casual, unrestricted opening of the doors of the federal courts to these claims not only would cast an undue burden upon those courts, but would also disregard our duty to support and not weaken the sturdy enforcement of their criminal laws by the States. That wholesale opening of State prison doors by federal courts is, however, not at all the real issue before us is best indicated by a survey recently prepared in the Administrative Office of the [232] United States Courts for the Conference of Chief Justices: of all federal question applications for habeas corpus, some not even relating to State convictions, only 67 out of 3,702 applications were granted in the last seven years. And 'only a small number' of these 67 applications resulted in release from prison: 'a more detailed study over the last four years * * * shows that out of 29 petitions granted, there were only 5 petitioners who were released from state penitentiaries.' The meritorious

claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.

For surely it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and [233] may be invoked by those morally unworthy. Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction.

Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. * * *"

And then he points out that Congress didn't do so, that Congress by the Act of 1867 placed that responsibility in the Federal District Court.

"As Mr. Justice Bradley, with his usual acuteness, commented not long after the passage of that act, 'although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus,

there seems to be no escape from the law'. * * * "

Then turning to the top of Page 501: "Our problem arises because Congress has told the District Judge to act on those occasions, [234] however rare, when there are meritorious causes in which habeas corpus is the ultimate and only relief and designed to be such." * * *

And then turning to Page 508:

"These standards, addressed as they are to the practical situation facing the District Judge, recognize the discretion of judges to give weight to whatever may be relevant in the State proceedings, and yet preserve the full implication of the requirement of Congress that the District Judge decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts. Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus. * * * But it would be in disregard of what Congress has expressly required to deny State prisoners access to the federal courts. * * * Insofar as this jurisdiction [235] enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy

Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted." * * *

Congress and the Supreme Court, then, have imposed upon Federal District Courts the power and the duty to consider and decide applications for habeas corpus by state prisoners. It is a difficult and burdensome duty. During the fiscal year which ended July 1, 1953, thirty-two such applications were filed in this Court. Twenty-two more have been submitted since July 1st. I have tried in [236] every way possible to minimize the trouble, inconvenience and expense which such applications necessarily impose upon the state courts, the Superintendent of the penitenitary and the State Attorney General. I decide more than half of them without issuing a show cause order or calling for a hearing. So far as I can now recall, I have granted only two, including Gonzales, in the past five years, and no state prisoner has been released by my order during that period.

The unfortunate thing about the newspaper criticism of the Gonzales decision in the Seattle Post-Intelligencer is that it fails to recognize that there

is a problem, but instead blames the individual Federal Judge who tried the case for what is regarded as its bad result. The newspaper charged that, as such judge, I exceeded my constitutional and statutory authority; that I improperly interfered with and violated state rights, and that I captiously and gratuitously interfered with the state's enforcement of its criminal laws.

Now under ordinary circumstances I would not say anything about newspaper or other criticism of my judicial acts. I have been criticized by experts —lawyers, law school journals, judges of appellate courts and others—and I have never complained. In a democracy, free and open criticism is healthful and stimulating. No public official or public institution, including judges and courts, should [237] be above or immune to criticism. But if it is to be in the public interest, criticism should be fair, informed and constructive. The Seattle Post-Intelligencer's criticism of my opinion in the present case was not of that character. In effect, it accused me of arbitrary, injudicial conduct. It was such as to discredit and lower public confidence in a Federal District Court, and in the peculiar circumstances presented here, I feel that it is my duty to speak up in defense of the Court.

I can well understand how the newspaper articles happened to be published. When the newspaper people learned that a conviction of murder of a defendant in a state court jury trial in Seattle had been set aside by an Eastern Washington Federal Judge, their natural reaction was one of shock

and resentment. They proceeded to interview the Superior Court Judge who presided at the trial, a law school dean, and perhaps some other lawyers. The comments of these gentlemen, as published in the P. I., showed a surprising lack of understanding and of misunderstanding of the law governing the powers and duties of a Federal District Judge in habeas corpus proceedings by state prisoners.

Now I do not intend any disparagement by that statement. Federal habeas corpus is a highly specialized difficult branch of the law, and lawyers and judges who have not had occasion to study or deal with it are not very [238] familiar with it. Moreover, the Seattle gentlemen interviewed by the P. I. were expressing spur-of-the-moment, curbstone opinions. They had not had an opportunity to read my opinion or examine the record on which it was based. They did not know the contentions or issues presented by counsel in the case.

Sometime later, on October 21, 1953, the P. I. published an editorial entitled "State Rights Invaded?" In fairness to the newspaper's editorial staff, I feel I should point out that they doubtless relied upon the opinions of the judge and the lawyers who had been interviewed and, as it now appears, prior to its publication the editorial was submitted to and approved by the newspaper's Seattle attorneys. I quote from the editorial as follows:

"Last week this murder conviction (of Gonzales) was set aside by Federal Judge Sam M. Driver. This means that while Gonzales may not be immediately released from prison, he will go free eventu-

ally unless the state assumes the trouble and expense of an appeal, which presumably it will do.

"The Federal decision was based upon Gonzales' plea that his confession was obtained by force and threats from police detectives. But obviously the jury did not believe there was [239] coercion, and neither did Judge Hodson. Furthermore, the jury was instructed carefully by the latter as to the weight of confession within the total evidence, which total was considerable. However, there is a far broader and deeper issue here—one going beyond judgments from the bench and far beyond the case of Albert Gonzales vs. Law Abiding Citizens. In the opinion of some of Seattle's legal minds, there is grave doubt as to the constitutionality of the statute which seems to allow Judge Driver to set aside the state's verdict. That, of course, is for the legal eagles to ponder; and, we trust, to correct when and if possible. What seems far more clear is that this is an invasion of states' rights by the Federal Government. And with due respect to the Federal court, we cannot avoid the feeling that the tenor of this Federal judge's opinion was uncalled for, injudicious, and an unjustified reflection on Judge Hodson and the twelve Seattle citizens called for jury duty."

That is the end of the quotation from the editorial of the Seattle Post-Intelligencer.

In addition to its being based upon a fundamentally false conception of the powers and duties of a [240] Federal Judge, the editorial clearly indicates that the writer had not ever read the opinion

which he so glibly condemned as uncalled for and injudicious. The opinion does not cast the slightest reflection on either Judge Hodson or the jury, as a casual reading of it would disclose even to an intelligent layman. As stated in the opinion, Judge Hodson's sole function with respect to the Gonzales' confession was to determine whether there was conflicting evidence that it was coerced. Having made that determination, it was his duty under the applicable state statute to submit it to the jury with all the evidence as to how it was taken. The jury, under instructions of the Court, had to decide whether the confession was coerced or voluntary, but the jury could not make any specific finding on that question. There is no provision for it, as has been pointed out here, in the state practice. The only expression it could make was its general verdict. It returned a verdict of guilty. There was evidence of guilt other than the confession. It is impossible to say, therefore, whether the jury accepted the confession as voluntary or rejected it as coerced and found the defendant guilty on the other evidence.

The question Judge Hodson and his jury had before them was the guilt or innocence of the accused. In the habeas corpus proceeding I was not concerned with that question. I had to decide whether Gonzales had been denied [241] due process of law in violation of the United States Constitution by the use as evidence against him of a coerced confession. Judge Hodson never had an opportunity to decide whether Gonzales' confession was coerced,

and no one possibly can say how the jury decided that tissue, so how could my opinion be any reflection on Judge Hodson or the jury?

When Alfred J. Schweppe wrote to the Post-Intelligencer correctly and ably stating the law governing the duties of a Federal District Judge in habeas corpus proceedings, the newspaper published his letter on the editorial page, but appended to it an editor's note to the effect that although it was a "good statement of principles," it overlooked a basic issue raised by my opinion, namely, that Gonzales had not exhausted his state remedies for the reason that he had not appealed from his conviction to the State Supreme Court. That issue has been argued here today and I have found that it has no merit and, of course, as I pointed out here, that question, that issue, was never raised before me in the entire proceedings, although there were three separate hearings in the Gonzales case at Walla Walla. So we have here also a judge being accused of improper and injudicious conduct for not deciding properly an issue that was not submitted to him by capable counsel in the case. This issue as to whether Gonzales exhausted his state remedies has, as you see, been decided adversely to [242] the contention that the remedies have not been exhausted.

I shall close these remarks with the observation that it is very important in these times that public respect for and confidence in the courts be maintained and press criticism of the courts, therefore, should be temperate, fair and constructive. And

may I add it has been my experience and observation that the press generally follows such policy. My relations with the press have been singularly congenial and happy. In almost fourteen years on the bench of state and federal court, this is the first time I have been criticized by the press for what is claimed to be improper or injudicious conduct.

Well, that is all I have to say, gentlemen. We now have the problem of settling the findings here. You have been submitted a copy of them, have you not?

Mr. Dimmick: Yes, I have. I assume that my petition for rehearing is denied?

The Court: Yes, I didn't say so in so many words, I presume, but that was the purport of my remarks I think.

I might here say that Mr. Etter sent me a copy of his proposed findings. You have a copy of them?

Mr. Etter: Yes, I do, your Honor, I have a copy.

The Court: And there are a few suggestions that I would like to make here. First, I don't want to foreclose counsel from making other suggestions or from discussing [243] mine, but I thought it might be helpful to start out by saying that I think the designation of "defendant" should be "respondent" throughout the findings.

(Further colloquy between Court and counsel concerning findings and conclusions of law, after which the following proceedings were had, to-wit.)

Mr. Dimmick: Well, for the record, and par-

ticularly with respect to Findings Nos. III, IV, V, VI and VII, and the four paragraphs of conclusions, I want to except to those.

The Court: Yes. Very well, the record may show that.

(Which was all of the proceedings had and evidence adduced on the hearing of the above-entitled cause.) [244]

[Endorsed]: Filed February 11, 1954.

[Title of District Court and Cause.]

RETURN AND ANSWER

Comes now John R. Cranor, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, through his attorneys, Don Eastvold, Attorney General, and Cyrus A. Dimmick, Assistant Attorney General, and in answer to the order to show cause and petition on file herein admits, denies and alleges as follows:

I.

Answering the petition of William Giron, Albert Gonzales and Cecil Coluya on file herein, respondent denies each and every allegation, matter and thing contained therein except insofar as such allegations or parts thereof are admitted in respondent's affirmative answer.

For further affirmative answer to the order to show cause and petition on file herein, respondent alleges:

I.

That on January 9, 1950, William Giron, Albert Gonzales and Cecil Coluya were, by information, filed in the Superior Court of the County of King in Criminal Cause No. 25721 of said county, charged with the crime of "Murder in the first degree"; that a [246] certified copy of the Information is attached to the return filed in the Supreme Court of the State of Washington.

II.

That on April 10, 1950, after having pleaded not guilty to the offense charge in the information, the jury trying the cause returned a verdict of guilty of murder in the first degree; that at said trial the petitioners herein were represented by counsel; that pursuant to said verdict of guilty, judgment and sentence was entered on the 28th day of April 1950, by James W. Hodson, Judge of the Superior Court for King County; that certified copy of the verdict, judgment and sentence and notice of appeal was mailed to the clerk of the supreme court on May 3, 1950; that warrant of commitment was issued on the 13th day of September 1950, all of which is shown by certified copies of judgment and sentence attached hereto and by reference made a part hereof the same as though fully set out; that said appeal was dismissed on the 8th day of September 1950. See Supreme Court Records, Causes Nos. 31445, 31446 and 31447, and by reference thereto made a part hereof.

III.

That the petitioners are being held in custody by respondent, John R. Cranor, under and by virtue of the aforesaid judgments and sentences and commitments.

Wherefore, respondent prays that the petition for a writ of habeas corpus filed herein be denied and the same be dismissed, and respondent be discharged from further answer herein.

DON EASTVOLD,
Attorney General
/s/ CYRUS A. DIMMICK,
Asst. Attorney General [247]

Duly Verified. [248]

In the Superior Court of the State of Washington
For the County of King

No. 25721

State of Washington, Plaintiff, vs. Albert Gonzales, William Giron and Cecil Coluya, Defendants.

Judgment and Sentence

The Prosecuting Attorney with the Defendant Cecil Coluya and counsel W. Beardslee came into Court. The Defendant was duly informed by the Court of the nature of the information found against him for the crime of Murder in the First Degree, committed on or about the 7th day of January, 1950, of his arraignment and plea of "Not guilty of the offense charged in the information,"

of his trial and the verdict of the jury on the 10th day of April, 1950, "guilty of Murder in the First Degree."

The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said Defendant having been duly convicted on the 10th day of April, 1950 in this Court of the crime of Murder in the First Degree it is therefore Ordered, Adjudged and Decreed that the said Defendant is guilty of the crime of Murder in the First Degree and that he be punished by confinement at hard labor in the Penitentiary of the State of Washington for a maximum term of not more than His Natural Life, and a minimum term to be fixed by the Board of Prison Terms and Paroles.

The Defendant is hereby remanded to the custody of the Sheriff of said County to be by him detained and delivered into the custody of the proper officers for transportation to the said Penitentiary.

Done in open Court this 28th day of April, 1950.

/s/ James W. Hodson, Judge

Presented by: Signed F. A. Walterskirchen, Deputy Prosecuting Attorney. [249]

[Title of Superior Court and Cause No. 25721.]

Judgment and Sentence

The Prosecuting Attorney with the Defendant Albert Gonzales and counsel J. E. Freeley, came into Court. The Defendant was duly informed by the Court of the nature of the information found against him for the crime of Murder in the First Degree, committed on or about the 7th day of January, 1950, of his arraignment and plea of "Not guilty of the offense charged in the information," of this trial and the verdict of the jury on the 10th day of April, 1950, "guilty of Murder in the First Degree."

The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said Defendant having been duly convicted on the 10th day of April, 1950, in this Court of the crime of Murder in the First Degree, it is therefore Ordered, Adjudged and Decreed that the said Defendant is guilty of the crime of Murder in the First Degree and that he be punished by confinement at hard labor in the Penitentiary of the State of Washington for a maximum term of not more than His Natural Life, and a minimum term to be fixed by the Board of Prison, Terms and Paroles.

The Defendant is hereby remanded to the custody

of the Sheriff of said County to be by him detained and delivered into the custody of the proper officers for transportation to the said Penitentiary.

Done in open Court this 28th day of April, 1950.

/s/ James W. Hodson, Judge

Presented by: Signed F. A. Walterskirchen, Deputy Prosecuting Attorney. [250]

[Title of Superior Court and Cause No. 25721.]

Judgment and Sentence

The Prosecuting Attorney with the Defendant William Giron and counsel W. Beardslee came into Court. The Defendant was duly informed by the Court of the nature of the information found against him for the crime of Murder in the First Degree, committed on or about the 7th day of January, 1950, of his arraignment and plea of "Not guilty of the offense charged in the information," of his trial and the verdict of the jury on the 10th day of April, 1950, "guilty of Murder in the First Degree."

The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said Defendant having been duly convicted on the 10th day of April, 1950, in this Court of the crime of Murder in the First Degree, it is

therefore Ordered, Adjudged and Decreed that the said Defendant is guilty of the crime of Murder in the First Degree and that he be punished by confinement at hard labor in the Penitentiary of the State of Washington for a maximum term of not more than His Natural Life, and a minimum term to be fixed by the Board of Prison, Terms and Paroles.

The Defendant is hereby remanded to the custody of the Sheriff of said County to be by him detained and delivered into the custody of the proper officers for transportation to the said Penitentiary.

Done in open Court this 28th day of April, 1950.

/s/ James W. Hodson, Judge

Presented by: Signed F. A. Walterskirchen, Deputy Prosecuting Attorney. [251]

Affidavit of Service by Mail attached. [252]

[Endorsed]: Filed July 14, 1953.

[Title of District Court and Cause.]

MOTION

Comes now respondent by and through his attorneys, Don Eastvold, Attorney General, and Cyrus A. Dimmick, Assistant Attorney General, and moves the court for permission to file as additional evidence in the above entitled cause a certified transcript of testimony of Albert Gonzales in Cause

25721 had in the superior court for the State of Washington for King County and a transcript of the testimony of Norbert William Larsen, Jr., in Cause No. 25721 in the superior court of the State of Washington for King County, on the ground and for the reason that respondent feels that the court should have this evidence in order to make a decision in the case now pending before the court, and to show that the petitioner did have the questions raised on the petition for writ of habeas corpus presented to the jury during the course of their trial in the superior court.

DON EASTVOLD,
Attorney General
/s/ CYRUS A. DIMMICK,
Assistant Attorney General [253]

[Endorsed]: Filed September 16, 1953.

[Title of District Court and Cause.]

ORDER

Respondent has submitted to this Court motion for permission to file, as additional evidence in the above entitled cause, a certified transcript of the testimony of petitioner Albert Gonzales in his State Court trial and a transcript of the testimony of certain witnesses for the plaintiff State of Washington, and also the testimony of Norbert William Larsen, Jr., a witness for the plaintiff in said trial. The Court has considered the same and, being advised in the premises,

It Is Now, Therefore, Ordered that the excerpts of testimony in the State Court trial of the petitioner Albert Gonzales and of other witnesses for the plaintiff State of Washington be received and admitted in evidence as Respondent's Exhibit 8, in the above entitled cause, and that the transcript of the testimony of Norbert William Larsen, Jr., a witness for the plaintiff State of Washington, in said State Court trial, be received and admitted in evidence, in the above entitled cause, as Respondent's Exhibit 9. The Clerk of the above entitled Court is hereby authorized and directed to inscribe the appropriate identifying marks on said exhibits.

Done by the Court this 16th day of September, 1953.

/s/ SAM M. DRIVER,
United States District Judge [254]

[Endorsed]: Filed September 16, 1953.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed between Don Eastvold, Attorney General of the State of Washington, by Cyrus A. Dimmick, Assistant Attorney General of the State of Washington, and R. Max Etter, attorney for William Giron, Albert Gonzales and Cecil Coluya, petitioners above, that petitioners had, prior to the hearing of this cause, petitioned the Supreme Court of the State of Wash-

ington for a writ of habeas corpus, which was denied, and that said petitioners thereafter petitioned the Supreme Court of the United States for a writ of certiorari, which petition has heretofore and before the time of hearing in the present cause been denied.

Dated this 28th day of September, 1953.

/s/ R. MAX ETTER,
Attorney for Petitioners

DON EASTVOLD,
Attorney General of the State of Washington

/s/ By CYRUS A. DIMMICK,
Assistant Attorney General of the State of Washington

[Endorsed]: Filed October 2, 1953. [255]

[Title of District Court and Cause.]

OPINION OF THE COURT

Driver, District Judge.

William Giron, Albert Gonzales, and Cecil Coluya, inmates of the Washington State Penitentiary, serving life sentences for murder, petitioned this Court for writ of habeas corpus. The petition was filed in forma pauperis; but, at the hearing on the order to show cause, an attorney of their own selection appeared for petitioners. He contends that a coerced confession of Gonzales was admitted in

evidence and used to secure the conviction of petitioners in the State Court trial, in violation of the due process clause of the Fourteenth Amendment.

At the hearing and adjourned hearings on the order to show cause, Gonzales testified on behalf of the petitioners; and a number of police officers of the City of Seattle testified for the respondent, Superintendent of the State Penitentiary. The Court took the case under advisement, and the respondent subsequently was granted permission to place in evidence transcribed excerpts of the State trial testimony of Gonzales and of several witnesses for the State. It appears from the evidence thus presented that, while Gonzales was in their custody, the Seattle police obtained from him a written confession, implicating Giron and Coluya, and that the confession was received in evidence at the trial over objection. In accordance with the prescribed State practice, the confession was submitted to the jury, together with the conflicting testimony as to the circumstances [257] in which it was made; and the jury was called upon to determine whether it was obtained under the influence of fear, produced by threats.[1] Although only part of the trial testimony

[1] R.C.W. 10.58.030. Whether a confession should be rejected as induced by threats or fear of violence is a question of fact for the jury to decide, unless the State concedes that it was coerced, or the admitted facts are such as to establish coercion, in which case it is a question of law for the Court. State vs. Seablom, 103 Wash. 53; State vs. Van Brunt, 22 Wn. (2d) 103; State vs. Meyer, 37 Wn. (2d) 759.

is in evidence here, it is sufficient to warrant the assumption that there was substantial evidence, other than Gonzales' confession, that the murder was committed as the result of a pre-arranged conspiracy, in the execution of which, each of the petitioners participated. The general verdict of guilty did not disclose whether the jury accepted the confession as voluntary, or rejected it as coerced and found the petitioners guilty on evidence other than the confession.

Petitioner Gonzales gave notice of appeal from the judgment of conviction; but nothing further was done to perfect the appeal, and it was dismissed by the Washington State Supreme Court, without consideration of the merits. Subsequently, petitioners applied to the same Court for writ of habeas corpus, and the application was denied without opinion. The United States Supreme Court denied certiorari.

The first question presented is whether this Court should make its own independent finding whether Gonzales' confession was coerced. The issue of coercion was presented to the jury, but, as stated above, how the jury decided it was not disclosed. Whatever consideration may have been given to the issue by the State Supreme [269] Court in its denial of petitioners' habeas corpus application, that Court does not, under its well settled practice, call witnesses to testify before it in person.

In Brown vs. Allen, 344 U.S. 443, decided February 9, 1953, the Supreme Court had occasion to consider what weight a Federal District Court

should give to prior determination by the State Courts of the issues raised in a petition for habeas corpus. The majority opinion states that, although the Federal Court may, without a hearing, adopt the State Court's determination, if it appears "that the State process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion," the Federal Court is not obliged or required to do so and * * * "a trial may be had in the discretion of the Federal Court or Judge hearing the new application. A way is left open to redress violations of the Constitution." (pp. 463, 464) If "a trial may be had," it follows that the Federal Court Judge, as a trier of the facts, may pass upon the credibility of the witnesses, resolve conflicts in the testimony, and make his own findings, as, otherwise, the trial would be pointless.[2]

It is established by the evidence in the instant case, without substantial dispute, that, on January 7, 1950, at about 1:30 a.m., petitioner Gonzales, a forty-one year old Philippino, with an eighth grade education, a limited [259] knowledge of the English language, and no prior acquaintance with American City Police methods, was arrested without a warrant and taken to the Seattle City Jail, where he was questioned regarding the shooting of one Fidel Molina, which had occurred about an hour before. The interrogation was continued off and on for a

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[2] Lisenba vs. California, 314 U.S. 219, 237, 238; Ashcraft vs. Tennessee, 322 U.S. 143, 147; see also Malinski vs. New York, 324 U.S. 401, 404.

period of about twenty-four hours. Gonzales had no sleep, and he was not permitted to call a lawyer or communicate with his friends or with the Philippine Consul, although he requested permission to do so. No charge was filed against him, and he was not taken before a committing magistrate. At five o'clock, a.m., January 7, he signed a statement which did not amount to a confession. Early next morning, January 8, he was taken before two officers who had not previously questioned him and made the confession, which was reduced to writing and signed by him.

In the present proceedings, Gonzales testified as follows: Shortly after he was taken to the City Jail, he was questioned by two Seattle Detectives, whom he named and identified. They told him that he would have to make a statement and would do so, if he "knew what was good for him." When he demurred and asked to see his lawyer, they "got mad," and told him that he would not be permitted to "see anybody or call up anybody" until he made a statement. One of the detectives struck Gonzales in the lower abdomen four or five times with his fists. "It hurt awful." The same detective swore at him and threatened to kick his "god damn face!" He made both the first statement and the confession, because he was afraid that he would be beaten again if he did not [260] make them. The two officers who took his confession did not abuse him in any way, but, on the contrary, were kind and sympathetic.

The detectives whom Gonzales accused of mistreating him both testified in person in the present

case and denied that they ever struck or threatened him. They said that they saw him only on one occasion while he was in the City Jail. On the morning of his arrest, at the request of the Desk Sergeant, they had gone to an upper floor of the jail and brought him down for questioning.[3]

The Court has heard and observed the witnesses

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[3] From the excerpts of the trial testimony in evidence here, it appears that the detective whom Gonzales accused of resorting to physical violence did not say, in either his direct or rebuttal testimony, whether he had seen Gonzales in the jail, but his testimony was such as to leave with the jury the impression that Gonzales had not seen him prior to the trial and was able to identify him because of a court room incident, related in the following quotation from the detective's rebuttal testimony:

Q. Now, after you completed your testimony as a State's witness, did you have occasion to return here to the court room? A. I did.

Q. And I will ask you whether in the absence of the jury you had any conversation with defense counsel here in the court room?

A. I talked to Mr. Freeley.

Q. Will you state whether or not the defendant Gonzales was present when you talked with Mr. Freeley?

A. We were standing right behind Gonzales, the three, the three defendants were sitting where they are. And I came over to right about where Mr. Freeley is now.

Q. And during the course of that conversation, will you state whether or not your name was mentioned?

A. Mr. Freeley mentioned my name two or three times.

Q. Was that—would that have been within the hearing of the defendant Gonzales?

A. They all looked at me.

on the disputed issue of coercion and has endeavored to keep in mind the time-honored rules which jurors are instructed to apply in judging the credibility of witnesses. The Court thinks that, basically, Gonzales' story is a true story. Since the evaluation of conflicting testimony depends upon imponderable factors, which are difficult to analyze and to express,[4] it is deemed sufficient merely to say the Court is convinced that Gonzales was beaten by the Seattle Police; that he was threatened with further physical violence, if he did not do their bidding; and that the fear, produced by such mistreatment, caused him to make the confession which was used against him at the trial. The officers who took his confession did not mistreat him, it is true, but there was no need for them to do so. He had been effec-

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Mr. Beardslee: That would call for a conclusion, your Honor, please.

The Court: Overruled.

Q. Now, directing your attention to the early morning of January 7, 1950, did you on the morning of January 7, 1950, or at any other time strike the defendant Albert Gonzales?

A. No, sir, I did not.

Q. Did you on the morning of January 7, 1950, or at any other time slap the defendant Albert Gonzales? A. I did not.

Q. Did you on the morning of January 7, 1950, or at any other time in any manner threaten the defendant Albert Gonzales? A. I did not."

[4] In the language of Mr. Justice Holmes, in Chicago vs. B. & O. Ry. vs. Babcock, 204 U.S. 585, 598, "many honest and sensible judgments * * * express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."

tively conditioned for confession by the softening-up process, administered by the two detectives. Gonzales' confession was not voluntary. It was the result of fear, induced by police brutality. [262]

Respondent maintains that, even though the confession be regarded as coerced, its submission to the jury would not invalidate the conviction of Gonzales, since there was other evidence sufficient to support the verdict of guilty. Respondent relies upon the case of Stein vs. New York, 346 U.S. 156, decided June 15, 1953. The cited case is distinguishable from the case at bar. There, a New York State Court, in a jury trial, found three defendants guilty of murder. The written confessions of two of them, implicating the third one, were admitted in evidence over objection. Defendants claimed that the confessions were coerced. Following a procedure generally similar to the Washington State practice, the New York Court heard the evidence with reference to coercion in the presence of the jury and left to the jury the determination of that issue. The jury returned a general verdict of guilty. There was competent evidence, other than the confessions, to sustain the verdict. The case came up by certiorari for direct review of the affirmance by the New York Court of Appeals of the trial court's judgment of conviction. There was no attack on the conviction by habeas corpus in the State Court or in Federal District Court. There was no finding by any court that the confession was coerced. In that posture of the case, the principal question, which the United States Supreme Court was called upon to decide,

was the constitutionality of the New York State procedure. [263]

The Court did not first consider whether there was evidence, other than the confessions, to support the jury's verdict. If respondent's contention here is sound, that should have been the initial inquiry, as it would have been the only one required to dispose of the case. Inquiry was first made into the circumstances under which the confessions were taken, in order to ascertain whether they would constitutionally support the convictions.[5] In doing so, the Court explained that the scope of its review of factual issues is very narrow and that, only in exceptional circumstances, to prevent grave miscarriages of justice will the weight of conflicting evidence to support the judgment under examination be reviewed. "When an issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great, and in the absence of conceded facts, decisive respect."[6] The Court considered the undis-

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[5] In the case under discussion, Stein vs. New York, supra, at page 179, the Court said: "Since these convictions may rest in whole or in part upon the confessions, we must consider whether they are a constitutionally permissible foundation for a finding of guilt.

"Inquiries on which this Court must be satisfied are: (1) Under what circumstances were the confessions obtained? (2) Has the use of the confessions been repugnant to 'that fundamental fairness essential to the very concept of justice?'"

[6] Ibid., p. 182.

puted facts and found that they failed to show that the confessions were the result of physical or psychological coercion, or that they were rendered inadmissible because of illegal detention of the accused. It concluded that, if the jury accepted the confessions as voluntary, the verdict would not, on that account, be objectionable on constitutional grounds.[7] [264]

There remained for consideration by the Court in the Stein case the alternative possibility that the jury may have rejected the confessions as coerced. If so, could the finding of guilt constitutionally rest upon other sufficient evidence? The issue had been raised at the trial by defendants' request for an instruction that, if the jury found the confessions were coerced, it must return a verdict of acquittal. The instruction was refused by the trial court.

The issue was a difficult one for the Supreme Court to decide. It had said, in effect, in a number of prior cases that, if a coerced confession is admitted in evidence, the judgment of conviction must be set aside, even though the evidence, apart from the confession, might have been sufficient to support a finding of guilt.[8] But to hold that rejection of the requested instruction constituted a violation of the Federal constitutional rights of the defendants would, in practical effect, condemn the long-stand-

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[7] Ibid., pp. 182-188.

[8] See Lyons vs. Oklahoma, 322 U.S. 596, 597 (footnote); Malinski vs. New York, 324 U.S. 401, 404; Galleqos vs. Nebraska, 342 U.S. 55, 63; Stroble vs. California, 343 U.S. 181, 190.

ing practice of New York and many other states of submitting to the jury the question whether a confession is voluntary. Moreover, the Court had never gone so far as to hold that the admission in evidence of a coerced confession required acquittal or discharge of the accused, but had sent the cases back to State Courts for retrial. The Court concluded that rejection of the requested instruction was not error.

The foregoing review of its salient features indicates that Stein vs. New York is not applicable to the [265] present case. Here, this Court, which is authorized to pass upon the issue, has found, as a matter of fact, that a coerced confession was used in a State Court trial to secure a conviction. Stein did not expressly overrule any of the earlier cases in which the Supreme Court unequivocally condemned the practice of securing confessions by force and violence and said that such enforced self-incrimination violates the due process clause of the Fourteenth Amendment, because it is fundamentally unfair and outrages the innate, deep-seated sense of justice of the American people. "The rack and torture chamber may not be substituted for the witness stand."[9] Gonzales' conviction should be set aside. That does not mean, however, that he will be unconditionally released. The State may try him again, without the use of the confession, if it chooses to do so.[10]

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[9] Brown vs. Mississippi, 297 U.S. 278; 285-286; see also Chambers vs. Florida, 309 U.S. 227.

[10] Johnson vs. Cranor, 143 Wash. Dec. 184.

Petitioners Giron and Coluya are in a different situation. As to them, no element of enforced self-incrimination is involved. They were named in Gonzales' confession, but the trial court instructed the jury that the confession of one of the defendants was not to be used or considered as evidence against other defendants, who might be implicated by the confession. The Supreme Court definitely has taken the position that, in the present circumstances, admission in evidence of the coerced confession of a defendant does not violate the [266] constitutional rights of a co-defendant.[11]

The petition for writ of habeas corpus is denied as to petitioners Giron and Coluya and is granted as to petitioner Gonzales. Findings of fact, conclusions of law, and order will be entered accordingly. The order will provide that Gonzales be released, unless the State grants him a new trial within sixty days after the date of the order, or, if appeal is taken, within sixty days after receipt by the Clerk of this Court of a Mandate of the Court of Appeals affirming the order.

October 8, 1953. [267]

[Endorsed]: Opinion. Filed Oct. 14, 1953, as amended by order of Dec. 7, 1953.

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[11] Malinski vs. New York, 324 U.S. 401, 410-412; see Stein vs. New York, 346 U.S. 156, 194.

[Title of District Court and Cause.]

PETITION FOR REARGUMENT

Comes now respondent by and through his attorneys, Don Eastvold, Attorney General, and Cyrus A. Dimmick, Assistant Attorney General, and respectively prays the court for permission to further argue to the court the question of whether or not the federal district court judge has jurisdiction or authority under the laws and constitution of the United States to consider a question of fact in a habeas corpus hearing when that question of fact has been properly presented and determined by a jury, duly impaneled in a state court proceedings.

DON EASTVOLD,
Attorney General

/s/ CYRUS A. DIMMICK,
Assistant Attorney General [270]

[Endorsed]: Filed December 15, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the above-entitled matter the petitioners' Petition for a Writ of Habeas Corpus came on regularly for final hearing on the 13th day of July, 1953, following previous adjourned hearings, the petitioners appearing and being represented by their attorney, R. Max Etter, and the respondent, John R.

Cranor, appearing and being represented by his attorneys, Don Eastvold, Attorney General of the State of Washington, and Cyrus A. Dimmick, Assistant Attorney General of the State of Washington, and all parties having announced themselves ready for hearing, and the Court having heard the evidence introduced, both oral and documentary, and the Court having previously heard other evidence introduced, both oral and documentary, and the Court having heard the argument of counsel and having thereafter permitted the placing in evidence of various exhibits, transcribed testimony and documents upon the request and motion of the parties here involved, and having considered all of the matters and things, documents in evidence introduced herein, and the further argument of counsel, and the Court having rendered its written Memorandum Opinion and correction thereto, and being fully advised in the premises, makes the following [271]

Findings of Fact

I.

That petitioners, and each of them, were charged on January 9th, 1950, by information filed in the Superior Court of King County, in the State of Washington, in criminal cause No. 25721, with the crime of "murder in the first degree", and that thereafter petitioners pleaded "not guilty" and trial was had; that at said trial the petitioners were represented by counsel and that after the trial of said cause and the return of a verdict of "guilty" by the jury, sentence was entered on the 28th day of

April, 1950, by Honorable James W. Hodson, Judge of the Superior Court for King County; that a warrant of commitment to the penitentiary was issued on the 13th day of September, 1950, and said petitioners, and each of them, were, at the time of hearing, so confined in the Washington State Penitentiary by reason of said commitment and by one John R. Cranor, the Superintendent of said Washington State Penitentiary at Walla Walla, Washington.

II.

That following said conviction the petitioners gave notice of appeal, but nothing further was done to perfect said appeal, and the same was dismissed by the Supreme Court of the State of Washington without consideration of the merits; that thereafter petitioners petitioned the Supreme Court of the State of Washington for writ of habeas corpus and the Supreme Court of the State of Washington denied said application without opinion; that thereafter petitioners applied to the Supreme Court of the United States for certiorari and subsequent thereto the United States Supreme Court denied certiorari; that thereafter the said petitioners filed petition for writ of habeas corpus in the above entitled court claiming that an illegally coerced confession of petitioner Gonzales was admitted in evidence to procure the conviction of Gonzales and the other petitioners, Giron and Coluya, and that [272] said use of the coerced confession was in violation of the due process clause of the Fourteenth Amendment.

III.

That petitioner Gonzales herein is a Philippino of the age of approximately forty-one years, and that said petitioner has an eighth grade education and limited knowledge of the English language; and likewise said petitioner Gonzales had had no contact with criminal law enforcement agencies and had no prior knowledge, understanding or acquaintance with police methods employed in certain American cities.

IV.

That on January 7th, 1950, at about the hour of 1:30 o'clock a.m. the said petitioner Gonzales was arrested in a taxicab without a warrant and was taken to the Seattle City Jail where he was questioned by police officers of the police force of the City of Seattle regarding the shooting of one Fidel Molina, which shooting, it was stated to him, had occurred about one hour or more previous to said petitioner's arrest; that said petitioner Gonzales was taken to the office of a police officer, Austin Seth, held, questioned for a lengthy period of time by two police officers of the Police Department of the City of Seattle, to-wit, officers Thomas and Ryan; that at said time and during the questioning the petitioner Gonzales was placed in a jail cell but was still not advised as to the reason for his detention; that he was removed subsequently from his cell and taken into a room in the police headquarters in the City of Seattle where he was questioned, threatened and abused by certain police officers of the City of Seattle; that he was advised

during the period of his questioning that it would be better for him to make a statement and that he would do so if he "knew what was good for him"; that during the confinement of said petitioner he was not permitted to call anybody or to see anybody; he was not permitted to call a lawyer or [273] to communicate with his friends or to communicate with the Philippine Consul, though he frequently requested permission so to do; that likewise petitioner Gonzales was not afforded any hearing before a committing magistrate or justice of the peace during the period of his detention, although a magistrate was available during said time.

V.

That about five o'clock a.m. on January 7th, 1950, the said petitioner signed a statement which did not constitute a confession of petitioner's guilt; that petitioner Gonzales was further threatened and the interrogation was continued following the signing of the statement at five o'clock a.m. on January 7th, 1950; that during the progress of the questioning petitioner Gonzales was struck in the lower abdomen near the groin on several occasions, and was, on one occasion, thrown, shoved, struck or pushed over and against a part of the building and room in which Gonzales was confined and questioned; that a police officer of the City of Seattle threatened, during the interrogation, to kick the petitioner's "God damn face"; that petitioner was abused and assaulted in particular by one certain police officer, one Thomas, and that at or about two o'clock

a.m. on the morning of the 8th day of January, 1950, and following some twenty-four hours of interrogation, during which time petitioner Gonzales had been without sleep or rest, and during which time he was constantly questioned and abused by police officers of the police force of the City of Seattle, the said petitioner signed a statement implicating petitioner in the shooting of Fidel Molina and implicating the other petitioners, William Giron and Cecil Coluya.

VI.

That, petitioner signed the statement at two o'clock a.m. on January 8th, 1950, in the presence of two officers, Seth and Sprinkle, who did not abuse him, but were, in fact, sympathetic [274] and kind; that, however, the said petitioner was in fear of further abuse, physical assault and mistreatment when he signed the statement at two o'clock a.m. on January 8th, 1950, and his said statement was signed as the result of fear of said petitioner Gonzales for the safety of his person and his life and said statement or confession was the result of fear and was induced by the police brutality employed.

VII.

That said coerced statement of January 8th, 1950, of petitioner Gonzales was admitted in evidence over objection and used in the trial of all of said petitioners, but no proof of enforced confession or self-incrimination was shown concerning petitioners Giron and Coluya. In said trial there was substan-

tial evidence other than the confession upon which the jury could have based its verdict of "guilty" as to petitioner Gonzales.

From the foregoing Findings of Fact, the Court now makes the following

Conclusions of Law

I.

That petitioner Albert Gonzales is being illegally detained by reason of the above and foregoing and specifically by reason of the fact that his conviction and confinement rests upon confession induced by physical abuse, coercive threats and brutality.

II.

That petitioners William Giron and Cecil Coluya are not being held by reason of a conviction resting upon facts induced by physical abuse, coercive threats and brutality or enforced self-incrimination as to each or either of them.

III.

That petitioner Albert Gonzales is entitled to relief in this Court by virtue of the petition, affidavits and facts proved [275] in support thereof, and petitioners William Giron and Cecil Coluya are not entitled to relief on the basis of the petition or the facts proved in support thereof.

IV.

The petitioners, prior to the filing of their petition in this court, exhausted all of their remedies in the Courts of the State of Washington.

Done in open Court this 23rd day of December, 1953.

/s/ SAM M. DRIVER,
United States District Judge

Presented by:

/s/ R. MAX ETTER,
Attorney for Petitioners [276]

[Endorsed]: Filed December 23, 1953.

In the United States District Court for the Eastern District of Washington, Southern Division

No. 739

In the Matter of the Application for a Writ of Habeas Corpus of WILLIAM GIRON, ALBERT GONZALES and CECIL COLUYA,
Petitioners,

vs.

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington. Respondent.

JUDGMENT AND ORDER

The above entitled cause came on regularly for hearing on the 13th day of July, 1953, following hearings held prior thereto before this Court, R. Max Etter, Esq., appeared for petitioners and Don Eastvold, Attorney General of the State of Washington, and Cyrus A. Dimmick, Assistant Attorney General of the State of Washington, appeared for

the respondent, John R. Cranor, and the Court having received evidence, both oral and documentary, during the trial, hearings and suspended hearings in said cause, and the Court having subsequently admitted certain documents and evidence proposed by petitioners and respondent, and having heard the argument of counsel, and having heretofore, on October 8th, 1953, rendered its Memorandum Opinion herein, and having corrected its said Memorandum Opinion on December 2nd, 1953, and having heretofore made and caused to be filed herein its written Memorandum and correction thereto, and written Findings of Fact and Conclusions of Law, and being fully advised in the premises,

Now, Therefore, in accord with said Findings of Fact and Conclusions of Law

It Is Ordered, Adjudged and Decreed: [277]

I.

That petition for writ of habeas corpus is granted to petitioner, Albert Gonzales, and it is ordered that said petitioner be released from confinement by the said respondent herein, unless, within sixty (60) days from the entry of this order the said State of Washington grants petitioner a new trial, or, in the event appeal is taken and the said order of this Court is affirmed, it is further ordered in that event, that petitioner be released from confinement by the said respondent herein within sixty (60) days after receipt by the Clerk of this Court of the said mandate of the Court of Appeals affirming said order, unless within said sixty days after receipt

of said mandate the said State of Washington grants petitioner Albert Gonzales a new trial.

It Is Further Ordered, Adjudged and Decreed that the petition for writ of habeas corpus of petitioners, William Giron, and Cecil Coluya, is denied.

Done in open Court this 23rd day of December, 1953.

/s/ SAM M. DRIVER,
United States District Judge

Presented by:

/s/ R. MAX ETTER,
Attorney for Petitioners [278]

[Endorsed]: Filed December 23, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John R. Cranor, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, respondent in the above entitled action, by and through his attorneys, Don Eastvold, Attorney General, and Cyrus A. Dimmick, Assistant Attorney General, hereby appeals from that part of the judgment entered on the 23rd day of December 1953, in the above entitled cause, granting a writ of habeas corpus to petitioner, Albert Gonzales. This appeal is from the United States District Court for the Eastern District of Washington, Southern Division, to the Cir-

cuit Court of Appeals for the Ninth Circuit, San Francisco, California.

DON EASTVOLD,
Attorney General
/s/ CYRUS A. DIMMICK,
Assistant Attorney General
Attorneys for Respondent [279]

[Endorsed]: Filed January 14, 1954.

[Title of District Court and Cause.]

MOTION FOR CERTIFICATE OF PROBABLE CAUSE

Comes now John R. Cranor, respondent herein, through his attorneys, Don Eastvold, Attorney General and Cyrus A. Dimmick, Assistant Attorney General, and respectfully moves the above entitled court for a certificate of probable cause for appeal to the United States Circuit Court of Appeals for the Ninth Circuit. This motion is based upon the records and files made in the above entitled matter and the order of the court entered on the 23rd day of December 1953.

DON EASTVOLD,
Attorney General
/s/ CYRUS A. DIMMICK,
Assistant Attorney General,
Attorneys for Respondent [280]

[Endorsed]: Filed January 14, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

This matter is before the court on motion of the respondent for a certificate of probable cause, it appearing that the petitioner, Albert Gonzales, an inmate of the Washington State Penitentiary, was granted a writ of habeas corpus pursuant to an order entered on the 23rd day of December 1953, and it appearing to the court that there exists probable cause for the respondent to have such an appeal and that the same is taken in good faith, now therefore

In compliance with Section 2253 of Title 28, U.S.C.A. the court hereby certifies that there exists probable cause for an appeal in behalf of the respondent, John R. Cranor, to the United States Court of Appeals for the Ninth Circuit.

Done by the Court this 15th day of January, 1954.

/s/ SAM M. DRIVER,
U. S. District Court Judge

Presented by:

/s/ CYRUS A DIMMICK,
Assistant Attorney General [281]

[Endorsed]: Filed January 15, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, John R. Cranor, Superintendent of Washington State Penitentiary, Walla Walla, Washington, the Respondent above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the Government of the United States of America in the just and full sum of Two Hundred Fifty and no/100 Dollars ($250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of January, 1954.

The Condition of this Obligation is such, That,

Whereas, the above named Albert Gonzales, on the 23rd day of December, 1953, in the above entitled action and Court was granted a writ of Habeas Corpus

And Whereas, The above named Principal has heretofore given due and proper notice that he appeals from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principal, John R.

Cranor, Superintendent of Washington State Penitentiary, shall pay all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and no/100 Dollars ($250.00), then this obligation to be void; otherwise to remain in full force and effect.

/s/ JOHN R. CRANOR,
[Seal] UNITED PACIFIC INSURANCE COMPANY
/s/ By WALTER H. OLSON,
Attorney-in-Fact [282]

[Endorsed]: Filed January 18, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: Stanley D. Taylor, Clerk of the above entitled court:

In preparing the record for appeal in the above entitled action, please include all pleadings, exhibits and transcript of testimony, except those pleadings and affidavits filed in support of the petitions of William Giron and Cecil Coluya.

DON EASTVOLD,
Attorney General
/s/ CYRUS A. DIMMICK,
Assistant Attorney General,
Attorneys for Respondent [283]

Affidavit of Service by Mail attached. [284]
[Endorsed]: Filed January 14, 1954.

[Title of District Court and Cause.]

APPELLEES' DESIGNATION OF RECORD

To: Stanley D. Taylor, Clerk of the above entitled court:

In preparing the record for appeal in the above entitled action, include the pleadings and affidavits filed in support of the petitions of William Giron and Cecil Coluya, and said pleadings and affidavits are designated by Appellees for inclusion in the record on appeal.

Dated: January 22nd, 1954.

/s/ R. MAX ETTER,
Attorney for Appellees [285]

Affidavit of Service by Mail attached. [286]

[Endorsed]: Filed January 22, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington do hereby certify that the documents annexed hereto are the originals filed in the above cause as called for in Appellant's Designation of Record filed on January 14, 1954, and Appellee's

Designation of Record filed on January 22, 1954.

Motion for Leave to file in forma pauperis.

Order to file in forma pauperis.

Application Petitions for a Writ of Habeas Corpus.

Order to Show Cause.

Motion to Dismiss.

Affidavit of Service by Mailing Motion.

Order Continuing Return Date on Show Cause Order.

Affidavit of William Giron in support of petition.

Affidavit of Cecil Coluya in support of petition.

Affidavit of Albert Gonzales in support petition.

Record of Proceedings at the Hearings.

Return and Answer.

Affidavit of Service by Mailing Return.

Exhibits, Nos. 1 to 10, inclusive.

Motion of Respondent to file additional evidence in the form of exhibits.

Order granting permission to file additional exhibits.

Stipulation as to previous appeals.

Opinion of the Court.

Order amending page 2 of the Opinion.

Petition for Reargument.

Findings of Fact and Conclusions of Law.

Judgment and Order.

Notice of Appeal.

Motion for Certificate of Probable Cause.

Certificate of Probable Cause.

Bond for Costs on Appeal.

Designation of Record.

Appellee's Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima in said District this 17th day of February, 1954.

[Seal] STANLEY D. TAYLOR,
Clerk of said Court
/s/ By THOMAS GRANGER,
Deputy

[Endorsed]: No. 14245. United States Court of Appeals for the Ninth Circuit. John R. Cranor, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Appellant, vs. Albert Gonzales, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed: February 19, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14245

In the Matter of the Application for a Writ of Habeas Corpus of WILLIAM GIRON, ALBERT GONZALES and CECIL COLUYA,
Petitioners,

vs.

JOHN R. CRANOR, as Superintendent of Washington State Penitentiary, Walla Walla, Wn.,
Respondent.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

To: Paul P. O'Brien, Clerk of the above entitled Court:

In printing the record for appeal in the above entitled case please print all pleadings, exhibits, transcript of testimony as shown by the transcript of record on appeal on file in your court. The Statement of Points relied upon by appellant are as follows:

(1) Whether the federal court has authority to try de novo any question decided pursuant to state law and procedure, where the state law is not unconstitutional.

(2) Whether the federal court can exercise jurisdiction except where errors of federal law have been committed.

(3) Whether federal courts may impose their

judgment over that of a duly impaneled jury in a proper state court proceedings.

(4) Whether a federal court may assume a state court failed to consider a constitutional question which is required to be considered by state law.

(5) Whether the judicial power of the United States extends to an inquiry into the federal constitutional integrity of a criminal judgment of the courts of a state whose corrective judicial processes are adequate and effective.

(6) Whether a federal court may accept the uncorroborated and unsupported testimony of a state prisoner petitioner in the face of the testimony of unimpeached state witnesses.

DON EASTVOLD,
Attorney General
/s/ CYRUS A. DIMMICK,
Assistant Attorney General

[Endorsed]: Filed Apr. 19, 1954. Paul P. O'Brien, Clerk.

In the

United States Court of Appeals

For the Ninth Circuit

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,
Appellant,

v.

ALBERT GONZALES, *Appellee.*

No. 14245

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLANT

DON EASTVOLD,
Attorney General,

CYRUS A. DIMMICK,
Assistant Attorney General,

Attorneys for Appellant.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASH.

In the

United States

Court of Appeals

For the Ninth Circuit

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,
Appellant,

v.

ALBERT GONZALES, *Appellee.*

No. 14245

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLANT

DON EASTVOLD,
Attorney General,

CYRUS A. DIMMICK,
Assistant Attorney General,

Attorneys for Appellant.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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In the

United States

Court of Appeals

For the Ninth Circuit

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,
Appellant,

v.

ALBERT GONZALES, *Appellee*.

No. 14245

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

On April 28, 1952, the supreme court of the State of Washington issued an order to show cause, returnable May 23, 1952, as a result of an application for habeas corpus filed by the appellee herein, Albert Gonzales, together with co-petitioners, William Giron and Cecil Coluya. Although the original

application for habeas corpus was filed pro se, counsel was later retained to present the matter in the supreme court of the State of Washington. This counsel was the law firm of Monheimer, Schermer & Mifflin of Seattle, Washington. The application for a writ of habeas corpus was denied on June 13, 1952. Subsequently, the same petitioners petitioned the supreme court of the United States for a writ of certiorari. This petition was denied on October 13, 1952. On November 7, 1952, the appellee herein, together with William Giron and Cecil Coluya, as co-petitioners, filed an application for habeas corpus in the United States District Court for the eastern district of Washington, southern division. Pursuant to an order to show cause issued by the Honorable Sam H. Driver, district court judge, hearings were held on the applications on February 5, 1953, July 14, 1953, and December 17, 1953. At the February and July hearings, the petitioners were present in court and with counsel, Mr. R. Max Etter, attorney at law, Spokane, Washington. At the December hearing the petitioners were not present but were represented by Mr. Etter. The respondent therein, the appellant here, John R. Cranor, superintendent of the Washington State Penitentiary at Walla Walla, Washington, was represented at each hearing by Cyrus A. Dimmick, Assistant Attorney General of the State of Washington. The result of these hearings was an order granting a writ of habeas corpus to appellee, from which respondent John R. Cranor, feeling himself aggrieved, filed a notice of appeal to the United

States Circuit Court of Appeals for the Ninth Circuit pursuant to the authority contained in 28 U. S. C. A. § 2253.

STATEMENT OF THE CASE

On the morning of January 7, 1950, at approximately 12:30 a. m., three men, who appeared to be oriental, drove to a position near the residence of one Fidel Molina in the city of Seattle, Washington. Within a very few minutes Fidel Molina, driving his car and alone, approached his residence. As he neared his driveway shots rang out and Molina slumped over the wheel of his car dead. The three men in the Ford in attempting to drive off became stuck in the ice and snow and each of them then left the car and proceeded away from the scene of the shooting on foot. A few minutes after this incident and some ten or twelve blocks from the vicinity of the shooting, appellee, Albert Gonzales hailed a cab. The cab driver immediately turned appellee over to the police who promptly transported him to the headquarters of the Seattle Police Department where he was placed in a cell in the jail. Later, at about 3:00 a. m. of the same morning, he was brought to the office of Sgt. Paul Foster, Homicide Division, in charge of the midnight to 8:00 a. m. shift, by Officers Kenneth W. Thomas and P. H. Ryan. After interrogation by Sgt. Foster, appellee signed a statement at approximately 5:00 a. m. in which he denied any complicity in the shooting of Fidel Molina. See Exhibit No. 1. Appellee was then returned to

his cell where he remained until approximately 10:30 p. m. on January 7, 1950, or about 21 hours after his arrest and about 17 hours after signing the first statement. At approximately 10:30 p. m. on January 7, 1950, appellee was taken to an interrogation room by Detectives Austin W. Seth and Don Sprinkle. He was interrogated by these officers until approximately 2:10 a. m. at which time he signed a full confession of his activities with regard to the shooting of Fidel Molina, and implicating Cecil Coluya and William Giron. See Exhibit No. 2. The confession was written in longhand by Detective Don Sprinkle and read and corrected by appellee, Albert Gonzales. Subsequently Cecil Coluya and William Giron were taken into custody, and on January 9, 1950, appellee together with Coluya and Giron were charged with murder in the first degree. The appellee and his co-petitioners were tried and found guilty of the crime of murder in the first degree in criminal cause No. 25721, in the King County Superior Court. During the course of the trial the two documents referred to as Exhibits 1 and 2 were admitted into evidence and submitted to the jury with the proper instructions pursuant to RCW 10.58.030, dealing with the admission of confessions in the superior courts of the State of Washington.

The question presented by the applications for habeas corpus of the petitioners, Gonzales, Giron and Coluya, was whether or not a confession allegedly "beaten" out of the appellee, Gonzales, could be used to support a conviction without violating the

due process clause of the United States Constitution. The question as presented to the federal district court by the appellee and the question which was determined was whether or not, in fact, the confession by the appellee had been extracted from him by the use of force and violence by members of the Seattle Police Department. The respondent contends that there was not sufficient proof before the federal district court upon which to base a finding that the confession had been extracted by force and violence and that the district court is without jurisdiction to act affirmatively in such a case where it is proved that the superior court of the State of Washington acted in and pursuant to the laws and procedure of the State of Washington, none of which has been found to be unconstitutional.

SPECIFICATIONS OF ERROR

1. Error is assigned to Finding of Fact No. 2, reading as follows:

> "That following said conviction the petitioners gave notice of appeal, but nothing further was done to perfect said appeal, and the same was dismissed by the Supreme Court of the State of Washington without consideration of the merits; that thereafter petitioners petitioned the Supreme Court of the State of Washington for writ of habeas corpus and the Supreme Court of the State of Washington denied said application without opinion; that thereafter petitioners applied to the Supreme Court of the United States for certiorari and subsequent thereto the United States Supreme Court denied certiorari; that thereafter the said peti-

tioners filed petition for writ of habeas corpus in the above entitled court claiming that an illegally coerced confession of petitioner Gonzales was admitted in evidence to procure the conviction of Gonzales and the other petitioners, Giron and Coluya, and that [272] said use of the coerced confession was in violation of the due process clause of the Fourteenth Amendment."

2. Error is assigned to Finding of Fact No. 4, reading as follows:

"That on January 7th, 1950, at about the hour of 1:30 o'clock a. m. the said petitioner Gonzales was arrested in a taxicab without a warrant and was taken to the Seattle City Jail where he was questioned by police officers of the police force of the City of Seattle regarding the shooting of one Fidel Molina, which shooting, it was stated to him, had occurred about one hour or more previous to said petitioner's arrest; that said petitioner Gonzales was taken to the office of a police officer, Austin Seth, held, questioned for a lengthy period of time by two police officers of the Police Department of the City of Seattle, to-wit, officers Thomas and Ryan; that at said time and during the questioning the petitioner Gonzales was placed in a jail cell but was still not advised as to the reason for his detention; that he was removed subsequently from his cell and taken into a room in the police headquarters in the City of Seattle where he was questioned, threatened and abused by certain police officers of the City of Seattle; that he was advised during the period of his questioning that it would be better for him to make a statement and that he would do so if he knew what was good for him; that during the confinement of said petitioner he was not permitted to call anybody or to see anybody; he was not permitted to call a lawyer or to communicate with

his friends or to communicate with the Philippine Consul, though he frequently requested permission so to do; that likewise petitioner Gonzales was not afforded any hearing before a committing magistrate or justice of the peace during the period of his detention, although a magistrate was available during said time."

3. Error is assigned to Finding of Fact No. 5, reading as follows:

"That about five o'clock a. m. on January 7th, 1950, the said petitioner signed a statement which did not constitute a confession of petitioner's guilt; that petitioner Gonzales was further threatened and the interrogation was continued following the signing of the statement at five o'clock a. m. on January 7th, 1950; that during the progress of the questioning petitioner Gonzales was struck in the lower abdomen near the groin on several occasions, and was, on one occasion, thrown, shoved, struck or pushed over and against a part of the building and room in which Gonzales was confined and questioned; that a police officer of the City of Seattle threatened, during the interrogation, to kick the petitioner's 'God damn face'; that petitioner was abused and assaulted in particular by one certain police officer, one Thomas, and that at or about two o'clock a. m. on the morning of the 8th day of January, 1950, and following some twenty-four hours of interrogation, during which time petitioner Gonzales had been without sleep or rest, and during which time he was constantly questioned and abused by police officers of the police force of the City of Seattle, the said petitioner signed a statement implicating petitioner in the shooting of Fidel Molina and implicating the other petitioners, William Giron and Cecil Coluya."

4. Error is assigned to the italic portion of Finding of Fact No. 6, reading as follows:

> "That, petitioner signed the statement at two o'clock a. m. on January 8th, 1950, in the presence of two officers, Seth and Sprinkle, who did not abuse him, but were, in fact, sympathetic [274] and kind; *that, however, the said petitioner was in fear of further abuse, physical assault and mistreatment when he signed the statement at two o'clock a. m. on January 8th, 1950, and his said statement was signed as the result of fear of said petitioner Gonzales for the safety of his person and life and said statement or confession was the result of fear and was induced by the police brutality employed.*"

5. Error is assigned to Conclusion of Law No. 1, reading as follows:

> "That petitioner Albert Gonzales is being illegally detained by reason of the above and foregoing and specifically by reason of the fact that his conviction and confinement rests upon confession induced by physical abuse, coercive threats and brutality."

6. Error is assigned to the italic portion of Conclusion of Law No. 3, reading as follows:

> "*The petitioner Albert Gonzales is entitled to relief in this Court by virtue of the petition, affidavits and facts proved* [275] *in support thereof*, and petitioners William Giron and Cecil Coluya are not entitled to relief on the basis of the petition or the facts proved in support thereof."

7. Error is assigned to the United States Federal District Courts assuming jurisdiction for the purpose of trying de novo a question which was decided pursuant to state law and procedure, where the state law is not unconstitutional.

8. Error is assigned to the United States Federal District Court in deciding a question of fact which had been previously decided by a court of competent jurisdiction of the sovereign state of Washington.

9. Error is assigned to the United States Federal District Court in assuming that the supreme court of the State of Washington failed to consider a constitutional question required to be considered by state law.

ARGUMENT

Specification of Error No. 2

The court erred in making and entering Finding of Fact No. 2. The district court does not gain any additional hearing power over a cause merely because there was no hearing before the supreme court of the State of Washington on the merits of the cause. The statutes and the rules of the supreme court of the State of Washington clearly make provisions for appeals for criminal cases such as the one now before this honorable court. See Appeals in Criminal Cases, 18 Wn. (2d) 14-80, and chapter 4.88 and 10.73 RCW. In addition, the constitution of the State of Washington, Article I, section 10, Amendment 10, guarantees the right to appeal to all persons convicted of a crime. Clearly, this is a right which the state may not deny by affirmative action. The right to appeal is one which must be

taken advantage of by the individual defendant and is not something which the state forces on a person who may not wish to appeal. In the present case there is no contention that the State of Washington ever denied the appellee the right to appeal. In fact, he did appeal. However, his counsel failed to perfect the appeal as required by law and it was subsequently dismissed pursuant to the rules of the supreme court of the State of Washington referred to previously herein. It is submitted that where, as here, there has been no discriminatory denial of appeal to defendants in the original state court proceedings, jurisdiction is not granted to the federal district court on habeas corpus to hear and determine a question which is, and should very properly be, raised on an appeal. Any other conclusion, of course, is clearly an invitation for other defendants in criminal cases to do what appellee Gonzales did here: that is, to deliberately or otherwise fail to perfect his appeal when he had the opportunity to do so, thus preventing the state supreme court from reviewing the case on the merits; and then, later when witnesses have died or disappeared, go to the federal courts using habeas corpus as a substitute for an appeal. Clearly, this is an anomaly and a complete distortion of constitutional principles and theories. Thus, where it is shown and demonstrated that the only basis for a constitutional denial is that error was committed in the trial court from which no appeal was taken, does not supply the jurisdiction which the federal district court could not otherwise acquire.

Specifications of Error Nos. 4, 5, 6

The court erred in making and entering Findings of Fact Nos. 4, 5 and 6 and the conclusions of law based thereon, namely Conclusions Nos. 1 and 3. Because of the interrelation of the Findings of Fact Nos. 4, 5 and 6 and Conclusions of Law Nos. 1 and 3 based thereon respondent deems it best to make the argument in support of these errors as a whole rather than taking each point separately.

As related in the Statement of the Case, the appellee and his co-petitioners were charged jointly on January 9, 1950, by information filed in the superior court of King County for the State of Washington, Criminal Cause No. 25721. Thereafter, they pleaded not guilty and a trial followed. The result of the trial was the conviction of each of the defendants of the crime of murder in the first degree (Tr. 31 and Ex. 3, 4, 5, and 6). Appellee and the co-defendants gave notice of appeal but nothing was done to perfect the appeal and it was eventually dismissed by the supreme court of the State of Washington for lack of prosecution (Tr. 232).

In order for the order of the Honorable Sam M. Driver to stand, there certainly must be findings of fact on which to base such an order. In this case there are obvious discrepancies in the findings of fact which findings are not supported by the evidence presented to the court. These obvious discrepancies appear in Findings of Fact Nos. 4, 5 and 6. The findings are set out in detail under the assignments

of error and will not be repeated here. It is sufficient to point out that appellee alleged in his testimony before the court that the only officer who beat him or in any way abused him was Officer Kenneth Thomas, and that this beating apparently occurred some five minutes after his arrival at the police station (Tr. 73, 77 and 78). While there were some references made to continued beatings it is submitted that none of this was testified to squarely on direct examination and the only pertinent testimony of a beating was brought out on cross-examination by respondent's attorney at which time the only person who had anything to do with the beating administered to Gonzales was stated to be Officer Thomas, all of which occurred approximately five minutes after Gonzales' arrival at the police station or about 1:45 a. m. the morning of January 7, 1950. Yet, it is noted that the testimony of Officer Thomas is to the effect that the first and only time that he saw the appellee, Gonzales, was at approximately 3:00 a. m. on the morning of January 7, 1950, at which time, together with Officer Ryan, he brought Gonzales from a cell in the jail down to the office of Sgt. Paul Foster in charge of homicide (Tr. 110). It is also important to note that while Gonzales testified that he had been beaten by Thomas five minutes after he was brought to the police station, the uncontradicted testimony of Officers Thomas and Ryan further indicates that at the time of the shooting and for some interval thereafter, they were in the north end of the city on patrol in a police car and did not arrive

at the police station until some time after Gonzales was arrested and placed in a cell. Their assignment to the case, if it may be called an assignment, was actually around 3:00 a. m. on January 7, 1950 (Tr. 102). Then at the request of Sgt. Paul Foster, they brought appellee from his cell to Sgt. Foster's office and spent, at the most, not over five minutes with him, this being the amount of time it took to bring him from the cell to Sgt. Foster's interrogation room (Tr. 103 and 111). In respondent's Exhibit No. 8, page 10, on examination by the prosecuting attorney, Sgt. Foster testified that as far as he knew at no time did Officer Thomas talk to the appellee or question him but that in fact he, Sgt. Paul Foster, interrogated him and took the first statement (Exhibit 1). Finding of Fact No. 4 also states that Gonzales was originally taken to the office of police officer Austin Seth. There is not one single bit of evidence to support this. In fact, Gonzales was taken to the office of Sgt. Paul Foster as previously stated. In addition, there certainly is no evidence in the record of continued questioning and certainly no evidence of any further beatings. Admittedly, during the interrogation by Officers Seth and Sprinkle, Gonzales was never abused or threatened in any way. At the very best, appellee testified as to the so-called continued questioning as follows (Tr. 49):

"Q All right. What did they do then?

"A Well, they said, 'You go downstairs,' he said. So they took me down in my cell.

"Q In your cell?

"A While I was in my cell, I started—I stay only about five or ten minutes, they took me up.

"Q How long did this keep up?

"A Oh, I couldn't recall, sir, because they kept on coming and picking me up every five or ten minutes.

"Q They were coming and bringing you out every five or ten minutes?

"A Yes, sir."

And, as has been previously pointed out, Gonzales never testified that he was beaten at any time following the alleged initial beating. On page 81 of the transcript he testified as follows:

"Q —were you again beaten or threatened or abused?

"A No, not exactly, sir.

"Q Not exactly. Well, let me ask you this: Was there any force at five o'clock to prompt you or to force you to sign this paper?

"A Yes, Sergeant Ryan just tole me to sign it, sir, and I cannot say no.

"Q You say he told you to sign; is that all he said, just sign this?

"A He stated first—

"Q Pardon?

"A I hesitated at first, but I might as well sign it, so I have to sign it, I cannot argue with officers.

"Q Did he hit you or threaten you in any way?

"A Well, of course, the sound of his voice, sir, I am afraid of that, see."

Again, in Finding of Fact No. 4 there is a finding to the effect that appellee was not afforded a hearing before a committing magistrate and justice of the peace during his detention although a magistrate was available during said time. It is respectfully submitted that there is no evidence in the record and no evidence any place else that a magistrate or justice of the peace was available for the purpose of holding a magistrate's hearing during the detention period which began at approximately 1:45 a. m., January 7, 1950, and ended Monday, July 9, 1950, at which time an information charging appellee with first degree murder was filed. The only evidence offered with respect to this was the statement of counsel representing appellee that so far as he knew, there was one available. It is as fair for counsel for appellant to state that there was none available on a Saturday or Sunday for that purpose or for any other purpose for that matter. Certainly, counsel for appellee had the burden of proof and his statement does not constitute evidence upon which a finding of fact can be based.

With respect to Finding of Fact No. 5, it is perfectly obvious that since the only testimony of Gonzales concerning his beating was that he was beaten five minutes after he was brought to the jail, completely belies the finding that following the taking of the statement at 5:00 o'clock a. m. on January 7, 1950, he was further beaten and abused. As a matter of fact, about the only thing that either counsel was able to get out of the appellee during the exami-

nation was to the effect that immediately following the taking of the statement at 5:00 a. m. January 7, 1950, he had been taken for a ride by some of the other police officers to point out one Giron's house. (Tr. 48) Certainly this is a far cry from the finding of fact previously referred to that Gonzales was struck in the lower abdomen near the groin on several occasions and was on one occasion thrown, shoved, struck or pushed over and against a part of the building and room. As has been previously mentioned with respect to finding of fact No. 4, it was stated that appellee was taken to the office of Sgt. Austin Seth and interrogated. However, the testimony of Sgt. Seth which is completely undisputed and there is no record of any other fact in the case, was that Sgts. Seth and Sprinkle were assigned to the case at 10:30 p. m. on January 7, 1950, (Tr. 177) which was, in fact, the first time that Sprinkle and Seth had seen this petitioner in connection with this case.

In assigning error to Finding of Fact No. 6 it must be brought out that the finding is certainly completely inconsistent. The appellant has no quarrel with the finding so far as it embraces the fact that Sgt. Seth and Sgt. Sprinkle did not abuse the appellee but were in fact sympathetic and kind. However, in so far as it is a finding that the only reason Gonzales confessed to this crime at 2:10 a. m. on January 8, 1950, or approximately 24½ hours after his arrest was because he was in fear for the safety of his person and his life and the statement

was the result of fear and was induced by police brutality, is not a logical sequence of events. A cursory reading of the transcript of the wire recording, beginning on page 146 of the transcript and running through 171 of the transcript discloses most of the conversation between the appellee and officers Seth and Sprinkle and will show that certainly Gonzales was not afraid or in fear of anyone at that time. A careful reading of it discloses that Gonzales actually felt that he was with friends and it would just be a much better thing for him and for everyone concerned if he did not see fit to tell any more lies, but told the truth. It appears to be an exculpatory statement by Gonzales rather than a statement of one in fear of life and limb. It is to be remembered that there is no evidence of any beating following the first five minutes of his arrival at the police station, to which Gonzales testified or that he signed a statement (Exhibit No. 1) approximately 4 hours after this is alleged to have occurred. In this statement he did not admit anything and certainly denied any complicity with anyone in connection with the shooting of Fidel Molina. Then, 20 hours later, he signed a statement before two kind, sympathetic police officers. Where is the fear of life and limb? It just does not exist. As a matter of fact, in signing the first statement, about all that Gonzales testified to as the reason for signing it was that he was afraid of the tone of the officer's voice. With particular reference to the testimony of Gonzales he stated directly that Sgts. Seth and Sprinkle alternated in

questioning him. It is clearly demonstrated, without any testimony whatsoever, in the transcript of the reporter, pages 149-153, that all through the questioning both Seth and Sprinkle were present in the room, together with Gonzales. It is true that Gonzales mentioned to Seth that he had been beaten. Seth took pictures of Gonzales in connection with this (Tr. 180-181) and they apparently showed no evidence of any beating. In addition there was a lineup of police for the purpose of having Gonzales identify his abusers (Tr. 182). Ryan and Thomas were not in that lineup. However, they did testify during the trial and it is to be noted that Thomas testified before Gonzales ever took the stand and yet Gonzales, upon taking the stand, stated that the person who had beaten him had not been in the courtroom and had not testified at the trial. Exhibit 8. However, later, Thomas was specifically brought in while Gonzales was testifying and at that time Gonzales identified Thomas as the person who had beaten him and again, of course, Gonzales stated that he knew Thomas by name because his attorney told him the name. Yet, as previously stated, he did not recognize him when he was on the stand testifying on behalf of the state (Ex. 8, page 23). It must go without saying, of course, that both officers Thomas and Ryan denied having ever abused, threatened or struck the appellee in any way. (Tr. 94, 109 and Ex. 8.) It is urged that there is no evidence in the record and there was none before the Honorable Sam M. Driver to support the findings

of fact which were entered and, of course, where those findings of fact have been demonstrated to be in error, any conclusions of law based thereon must, of necessity, be in error.

SPECIFICATIONS OF ERROR NOS. 6, 7, 8

Specifications of Error Nos. 6, 7 and 8 will be presented together because of their interrelation with each other. The appellant has not contended, and makes no contention here, that it is necessary to perfect an appeal in order to give rise to the right guaranteed by the constitution for a writ of habeas corpus. Nor, by the same token, does the appellant contend that the writ of habeas corpus is unavailable where there has not been an appeal. However, it must be remembered that the right of habeas corpus embodied in the federal code, namely Title 28, § 2254 U. S. C. A. and RCW 7.36.010 of the Washington Code, gives the right to a prisoner held in custody, pursuant to statute, to have a determination made on habeas corpus of whether or not a constitutional guarantee was denied to him. *Wade v. Mayo*, 334 U. S. 672 (1948); *Brown v. Allen*, 344 U. S. 443 (1953); *U. S. v. Baldi*, 198 F. (2d) 113. It appears that the appellee in this case, Albert Gonzales, did exhaust those remedies available to him under our statutes for habeas corpus providing extraordinary procedures for review after conviction. In the state courts his applications for habeas corpus were denied because there had not been in fact any denial of due process of law or any other guarantee of the con-

stitution of either the United States or the State of Washington.

It is respectfully submitted that the question presented to the United States District Court by the petitioner in this case was solely a question of fact. It is conceded that the matter of coercion in the procurement of Gonzales' confession was submitted to the jury in a state court trial under a proper instruction from the court pursuant to RCW 10.58.030 in accordance with the prescribed Washington procedure as is proper where the claim of coercion is in actual dispute (Tr. 219). In *State v. Meyer*, 37 Wn. (2d) 759, at 770, our supreme court said:

> "We have decided that it is for the jury to determine whether a confession was obtained under the influence of fear produced by threats. *State v. Barker*, 56 Wash. 510, 106 Pac. 133; *State v. Wilson*, 68 Wash. 464, 123 Pac. 795; *State v. Kelch*, 95 Wash. 277, 163 Pac. 757; *State v. Van Brunt*, 22 Wn. (2d) 103, 154 Pac. 606. We pointed out in the *Barker* case that if it should appear to the court that a confession was made under the influence of fear produced by threats, it was its duty to exclude the evidence, and that it was proper for the court to hear the evidence relating to duress and decide upon the admissibility of such evidence. We held that there was nothing in the statute requiring such evidence to be taken without the presence of the jury and that there need not be two examinations of the witnesses, one before the court and the other with the jury present. A situation may arise in the trial of a case where the court might, in its discretion, make some inquiry in the absence of the jury with reference to how a confession was obtained, but the theory

> of our decisions is that the court is not required by the statute to do so."

The jury in the state court proceedings in which the appellee was involved heard both the uncorroborated testimony of Gonzales that coercion had been employed and the testimony of police officers that Gonzales had never been harmed or threatened. There was substantial evidence aside from and in addition to the confession. There is no provision in the Washington law for a special verdict in a criminal proceedings to determine whether or not the confession was coerced before a verdict of guilty. The jury found Gonzales, the appellee here, guilty by its general verdict. The procedure employed by the trial court in submitting the factual question presented by the confession to the jury is fully constitutional. *Stein v. New York*, 346 U. S. 156 (1953) and cases cited. Further, a confession is not necessarily inadmissible even though obtained six days after the defendant's arrest and without his having been taken before a justice of the peace as a committing magistrate. In *State v. Winters*, 39 Wn. (2d) 545, at page 549, our court said:

> "[5] The appellant contends that the confession was not admissible, because it was obtained six days after his arrest and without his having been taken before a justice of the peace, as a committing magistrate, in the meantime. He cites the statutes pertaining to procedure before a justice of the peace. It is, of course, somewhat similar to the procedure before United States commissioners, as provided for in Federal Rule 5(a) of the Federal Rules of

> Criminal Procedure. He then cites *McNabb v. United States*, 318 U. S. 322, 87 L. Ed. 819, 63 S. Ct. 608, and *Upshaw v. United States*, 335 U. S. 410, 93 L. Ed. 100, 69 S. Ct. 170, to the effect that such a delay in bringing a prisoner before the commissioner makes a confession inadmissible. These cases are not in point. This is neither a Federal case nor a proceeding before a justice of the peace. The cases relied upon are not predicated upon either Washington state or Federal constitutional provisions, but only on a rule of procedure. There is no constitutional or statutory provision in the state of Washington having to do with the use of confessions as evidence against a defendant in a criminal trial, except Rem. Rev. Stat. § 2151. Under the purview of the statute it was not error to admit the confession."

It has already been noted that the appellee was arrested at approximately 12:30 on a Saturday morning and was charged with the crime of murder of the first degree the following Monday morning. Confessions are admissible in the State of Washington and certainly it is a question for the jury under the proper instructions. In *State v. Van Brunt*, 22 Wn. (2d) 103, at page 108, our court had this to say:

> "[2] In this case there was a controversy over the question of threats and inducements, and the court gave the following instruction:
>
> " 'By the law of this State the confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him except when made under the influence of fear produced by threats.
>
> " 'You are instructed that confessions and admissions are to be received with great caution. You are instructed, however, that if, upon the

whole testimony, you are satisfied that any confession or admissions were made by a defendant, and are also satisfied that the same were voluntary upon the part of such defendant, then the same shall be considered by you as evidence in this case. If otherwise, they shall not be considered as evidence.

" 'A confession or admission by a defendant is voluntary if at the time of making it he is not under the influence of fear produced by threats; that is, if he may or may not speak, as he choses.

" 'A confession made under inducement is not sufficient to warrant a conviction without corroborating testimony. You are instructed that corroboration may be either by direct testimony or by circumstantial evidence. . . .' "

It follows that appellee did not show a denial of due process as guaranteed by the Fourteenth Amendment. Title 28 U. S. C .A., § 2241, provides as relevant to the present case that

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

" * * * * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; * * * "

We earnestly urge that factual review is not authorized by this provision. That is, a federal district court judge sitting by himself may not decide a question of fact which has been properly presented to a jury in a court of competent jurisdiction in the State of Washington notwithstanding that that district judge may feel the jury came out wrong. Further, it is submitted there is no authority whatsoever for a federal court to review de novo any factual

question properly submitted to the trial court, but that the federal court to whom the application is made can only exercise at most a purely revisory appellate jurisdiction as to errors of federal law only. See *Taylor v. Alabama*, 335 U. S. 252, at 262. In *Schechtman v. Foster*, 172 F. (2d) 339 (CCA 2d 1949) Judge Learned Hand wrote the opinion of the court in a case where the petitioner sought habeas corpus on the ground that perjured testimony had been used to secure his conviction in the state court. The petitioner had previously made numerous unsuccessful attempts by various writs in state courts to have his conviction reviewed. In affirming a denial of the writ by the United States District Court, Judge Hand said:

> "* * * It must be remembered that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. *If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights.* * * *" (Emphasis supplied.)

In *Odell v. Hudspeth*, 189 F. (2d) 300 [CCA 10th 1951], a case arising in Kansas, the court said at page 301:

> " * * * To authorize relief to a state prisoner under section 2241, the deprivation of constitutional rights must be such as to render the judgment void. Mere errors in proceedings by a state court in the exercise of its jurisdiction over a case properly before it, however, serious, cannot be reviewed by habeas corpus. Habeas corpus proceedings may not be employed as a substitute for appeal. *Frank v. Mangum*, 237 U. S. 309, 326, 35 S. Ct. 582, 59 L. Ed. 969; *Maxwell v. Hudspeth*, 10 Cir. 175 F. 2d 318, certiorari denied 338 U. S. 834, 70 S. Ct. 39; *Garrison v. Hunter*, 10 Cir. 149 F. 2d 844, *Rosenhoover v. Hudspeth*, 10 Cir. 112 F. 2d 667. Federal courts will intervene only when the fundamental rights of the prisoner have been denied and taken from him arbitrarily and a trial in accordance with the established law of the state in a court of competent jurisdiction has not been afforded. * * * "

See also *Graham v. Squire*, 132 F. (2d) 681 (CCA 9th 1942); *Brach v. Hudspeth*, 111 F. (2d) 447 (CCA 10th, 1940); *Leonard v. Hudspeth*, 112 F. (2d) 121 (CCA 10th, 1940).

Assuming without admitting that a factual review is authorized in the circumstances, we respectfully submit that the United States District Court can have no greater power in this area than the United States supreme court could assume on direct appeal. The limitations upon such review by the latter court are clearly set out in *Stein v. New York*, *supra*, on pages 180 and 182 in the following language:

> "Petitioners' argument here essentially is that the conclusions of the New York judges

> and jurors are mistaken and that by re-weighing the same evidence we, as a super-jury, should find that the confessions were coerced. This misapprehends our function and scope of review, a misconception which may be shared by some state courts * * *
>
> "* * * * * * * *
>
> "* * * When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded fact, decisive respect. [Citing cases.]"

In the present case there is no such impeachment by conceded facts such as would warrant inquiry into the factual determination of the jury. The only question is whether the word of Gonzales is to be believed as against the word of the officers. At least this was the only question presented to the Honorable Sam M. Driver. Judge Driver, believing Gonzales over the police officers, found that as a matter of fact the confession was coerced and that being coerced, Gonzales was denied due process of law in being convicted. In connection with the *Stein* case it might possibly be argued that because Gonzales did not secure review by appeal, as did the defendants in the *Stein* case, but rather employed habeas corpus by the state courts for that purpose, the issue had not been fairly reviewed under the rules above quoted. Aside from this it is submitted the cases are identical. The petitioners did present the identical issue to the Washington State Supreme Court by habeas corpus. The Washington law requires the

court to consider a constitutional question when so presented to determine whether or not a petitioner has been denied any right guaranteed by the constitution of the United States. RCW 7.36.140 provides as follows:

> "In the consideration of any petition for a writ of *habeas corpus* by the supreme court, whether in an original proceeding or upon an appeal, if any federal question shall be presented by the pleadings, it shall be the duty of the supreme court to determine in its opinion whether or not the petitioner has been denied a right guaranteed by the Constitution of the United States."

The supreme court of Washington following its usual procedure denied the application for habeas corpus without opinion. It must be assumed that the state supreme court complied with the statute and denied the application because there was, in fact, no showing of constitutional deprivation. *Schechtman v. Foster*, *supra*. The judgment in the state trial court was rendered in an action by and in the name of the state and against the appellant for a public wrong. The proceeding instituted by the petitioner is basically a collateral attack on the judgment of the trial court and clearly it should not succeed.

In *Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. Ed. 1192, there were conceded facts and the supreme court stated in that case that:

> "We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom

> by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.
>
> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. * * *"

Certainly no one can argue against logic such as this. However, in the instant case there are no uncontradicted facts upon which to base the decision. First Judge Driver had to weigh the uncorroborated testimony of appellee, Gonzales, against that of three Seattle police officers. Then he had to make a decision as to who was telling the truth. After making the decision he found as a matter of fact the confession was coerced. All this, after the same issue had been presented to a jury of the appellee's peers in the Washington trial court. In *Palakiko v. Harper*, 13, 394, Dec. 10th, 1953, this court had this to say in connection with due process:

> "The reason for the rule stated in the *Rosenberg* case, *supra*, is, we think, that while, as a matter of procedural due process, a person accused of crime must be given a fair opportunity to try the question whether he has been denied due process of law through the procure-

ment of a coerced confession, yet he is not entitled to more, or to repeated trials of that question. Thus in *Stein v. New York*, 346 U. S. 156, 179, where the question of the voluntariness of confessions was submitted to a jury, the court asked the question: 'Was it unconstitutional if these confessions were used as the basis of conviction?' And in answering it said (page 182): 'When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect.' In a similar decision the Court of Appeals for the Third Circuit, (*United States v. Baldi*, 198 F. 2d 113, 118), quoted from Mr. Justice Reed's opinion in *Lyons v. Oklahoma*, 322 U. S. 596, 605, the following: 'The Fourteenth Amendment does not provide review of mere error in jury verdicts, even though the error concerns the voluntary character of a confession.' "

And, again, in the *Palakiko* case this court said:

> "In *United States v. Rosenberg*, (2 cir.), 200 F. 2d 666, 668, cert. den. 345 U. S. 965, 1003, the court, speaking of the remedy under § 2255, Title 28, and comparing it to the writ of habeas corpus, said: 'It, like that writ, "cannot ordinarily be used in lieu of appeal to correct errors committed in course of a trial *even though such errors relate to constitutional rights.*" ' (Emphasis added.)"

To further illustrate the feeling of the United States Supreme Court with regard to the federal court reviewing and deciding a question of fact already decided in a state court, in *Watts v. Indiana*, 338 U. S. 49, 93 L. Ed. 1801, our supreme court said:

> "In the application of so embracing a con-

> stitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. * * * "

CONCLUSION

In conclusion, it is respectfully submitted that appellant has shown that the findings of fact to which he makes exceptions are not supported by the record. Thus the conclusions of law and order based thereon must fall. Assuming that the federal district court had the right under the federal statutes to make an independent de novo factual examination, the result must be based on correct findings of fact. It is further appellant's position that it has been clearly demonstrated that the United States Federal District Court does not have the jurisdiction to dabble into questions of fact which have already been properly decided by a court of competent jurisdiction in a given state, and this, notwithstanding that there has not been any review in the State Supreme Court. It has been pointed out and needs no citations that a habeas corpus may not

be used as a writ of error or as an appeal. And where a prisoner of a state has not used the remedy which is available to him, that is, the remedy of appeal, he does not thereby give his application any greater stature than it would have had there been an appeal. Certainly, the effect of his failure to appeal is the same as if it had been appealed and the trial court affirmed.

Appellant respectfully submits that the United States District Court's decision and order should be reversed.

Respectfully submitted,

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No. 14245

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

JOHN R. CRANOR, Superintendent of the Washington State Penitentiary at Walla Walla, Washington,

Appellant,

vs.

ALBERT GONZALES,

Appellee.

Appeal from the United States District Court for the Eastern District of Washington, Southern Division

HONORABLE SAM M. DRIVER, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

The appellee accepts the jurisdictional statement of the appellant.

STATEMENT OF THE CASE

The appellant's statement of the case is controverted in part as being incomplete and will be amplified because it presents, primarily, those matters relating more to the substance of the facts having to do with guilt or innocence of the appellee, while the question here, relating as it does to habeas corpus, is not involved in that issue. The statement of appellant, however, so far as it describes the crime committed is correct, though appellant has condensed the factual statement to a brevity, dangerously incomplete.

Appellee, Albert Gonzales, was a man of 45 years, without family and with an eighth grade education. He was a Filipino and had arrived in the United States from the Philippine Islands in 1929. His work had consisted primarily of menial tasks, so-called, as a cannery worker and as a mess attendant (Tr. 41-42). Appellee had never before been in trouble with the police or law enforcement agencies and had never been in a police station in his life prior to the arrest in this case (Tr. 50). Appellee, during the time of his detention (24½ hours) was not permitted to call counsel nor to contact the representative of the Philippine government in the City of Seattle. During all of that time he was confined and subjected to intermittent questioning. His arrest had occurred between 1:00 and 1:30 A. M. on Saturday morning, the 7th of Janu-

ary, 1950 (Tr. 42). Consequently, the appellee was without sleep on the evening and night of Friday-Saturday, the 6th-7th of January, 1950, and was without sleep throughout the entire day of Saturday and certainly up until the hour of 2:10 A. M. when a confession was extracted from him. (See Exhibit 2.) Consequently, the period of questioning extended in excess of twenty-four hours, while his period of sleeplessness was considerably in excess of that. The record does not disclose whether or not appellee received food (Tr. 90).

Claims were almost immediately made by appellee that he had been mistreated and beaten by officials of the Seattle Police Department. As a result thereof a line-up was had at the Seattle Police Station of the detectives for the purpose of allowing appellee and his attorney to identify those whom it was claimed by appellee had mistreated him, but neither of the detectives involved, Ryan and Thomas, was in the line-up (Tr. 107-108; 118). Likewise, as a result of appellee's complaints of mistreatment, pictures were taken of the appellee on the 9th day of January, 1950 (Tr. 144; 180; 181; 182). Just prior to the confession, detectives Seth and Sprinkle of the Seattle Police Department alternately questioned appellee for a period of about two hours and forty-five minutes (Tr. 124), although the recording used in the trial in the State Court, the text of which is set out in the transcript, involved a

playing time of only about thirty-five minutes. The confession itself was written by detective Sprinkle (Tr. 124). This confession was procured with the use of deceit by the questioners and an affected sympathy for Gonzales (Tr. 125).

A few hours after appellee's arrest on the morning of January 7th, 1950, or at 5:00 A. M., one statement was secured and then by virtue of further and continued persistent questioning, the confession attacked in this proceeding was secured about 2:10 A. M. on January 8th, 1950 (Tr. 47, 124; Exhibits 1 and 2).

The above facts are undisputed. Likewise, appellee was arrested without a warrant and was not taken before a commiting magistrate for hearing (Tr. 42, 55).

Appellee testified that upon his arrest he was taken to the Seattle Police Station and that some time after he had arrived at the police station he was questioned by a sergeant. It might be well to state here that the sergeant was not Austin Seth, and Brief of Appellant is correct where it points out that Gonzales was taken to the office of Sergeant Foster, rather than Austin Seth. (See Appellant's Brief, page 17.) At that time a lawyer was requested by Gonzales, but he was told he could not call anybody until he made a statement (Tr. 44). After this questioning, detective Ryan came in and took appellee upstairs where he again requested counsel and was refused; that then another detective

came in, identified later as detective Thomas, who appellee testified, grabbed him and pushed him up against a radiator which caused appellee's head to strike the window; that thereafter the detectives beat appellee up on the belly and below the belt about four or five times, so that it hurt "awful" (Tr. 44, 45, 46). Appellee further testified that the detective said "God damn it" and he said "punch you in the sidewalk. I'm going to kick your God damn face," he said (Tr. 46). Appellee testified that he then signed a statement, but did not implicate anybody. Appellee testified that he was then taken out to the house of Giron, another defendant in the cause, and that at such time he was threatened by the detectives with a gun. That thereafter he was further questioned, but that he was tired and his stomach was painful, and that about every five or ten minutes he was questioned and "they took me up" (Tr. 48-49). Appellee testified he had difficulty with urination after the assault; that thereafter and some time later he was questioned by detectives Seth and Sprinkle who appellee states were indulgent toward him and told him with sympathy that they were with him, but indicated that he might get another beating from some other detective, although not from either of them (Tr. 51, 52, 53). A wire recorder was used during the questioning of appellee at the time by detectives Seth and Sprinkle, and after the confession was signed, appellee was allowed to call up a friend, but not a lawyer, and he did not see a lawyer until

about Monday or Tuesday, which would have been three or four days after his arrest (Tr. 54, 55, 56).

Appellee testified that because he was beaten up "I cannot stand any more" and that he was in fear of bodily harm when he signed the confession. (Exhibit 2. Tr. 57, 91, 92.) He also testified that he told about these events in his trial in the State Court, but that he was cut off from telling the full story.

The allegations which have been set out here were disputed by the testimony of Ryan and Thomas, but the testimony of Seth and Sprinkle as to their relationship with appellee did not controvert appellee's testimony. It appears that Seth and Sprinkle affected sympathy toward appellee, and the wire recording so indicates. (Tr. 146-171 inclusive, and see Tr. 65, 66.) It is noted, however, that at page 148 of the Transcript, Gonzales states (and this was on the wire recording) "Well, of course, I will come to the clear now because I don't want to have any more beef. I've had enough now. I could make another statement, but you could break it down."

The facts in this case are undenied to the extent that detectives Thomas and Ryan had definite personal contact with appellee, although, in the State Court trial, it was made to appear when appellee claimed assault and coercion, that Thomas had had no personal contact with him whatsoever (Tr. 223-224).

ARGUMENT

Specification of Error No. 1

Answer to Specification of Error No. 1.

The right of appellee to invoke the jurisdiction of the United States District Court, despite the failure to perfect an appeal from the original conviction in the State Court, is well settled. In *Brown v. Allen,* 344 U. S. 443, the majority said at page 486:

> "Also, this Court will review state habeas corpus proceedings, even though no appeal was taken, if the state treated habeas corpus as permissible."

This language applies to the instant case because the State of Washington, having made habeas corpus available (see *In re Johnson v. Cranor,* 43 Wash. 2d 200; 260 P. (2d) 873) the instant case could be determined on the merits. This Court employed the reasoning in *Brown v. Allen,* and anticipated it in *Ekberg v. McGee,* 191 F. 2d 625, 626.

See also:

Ex parte Boyden, 205 F. 2d, 485;
Hampson v. Smith, 153 F. 2d, 417.

The appellee, Gonzales, had invoked the alternative remedy of habeas corpus in the Washington State Supreme Court after his conviction and the initiation

of his appeal which was not completed. Certiorari was denied in the Supreme Court of the United States, *Giron, et al, v. Cranor,* 344 U. S. 947.

SPECIFICATIONS OF ERROR NO. 2, 3, 4, 5, 6

B. Answer to Specifications of Error No. 2, 3, 4, 5, 6.

Appellant argues the controverted issues of fact, and the only contention with which appellee is in full agreement is the statement that (Appellant's Brief, page 17) appellee was taken to the office of sergeant Foster rather than Austin Seth. The finding in this respect was without question the result of a dictation or transcription error, and is not a matter of substance infecting the primary issue, which would require reversal of this case. Appellant also suggests some error in the fact that there is a finding that there was a magistrate available for a hearing during the detention of appellee. Appellant's Brief in that respect now proposes an argument that could have been made during the trial and in the record of this case. Appellant states that the only evidence on this point was the statement of counsel for appellee. It might be well to examine that statement in the context of the trial testimony and also in other relevant evidence. At pages 67 and 68 of the Transcript there is a statement by appellee's counsel directed specifically to the Assistant State Attorney General, in which it appears that ap-

pellee's counsel said in substance, that the Assistant Attorney General probably should be advised as to appellee's position; that the question had to be answered why it was that appellee was held in the Seattle jail when there was a magistrate upstairs who was available, etc. To this statement no answer was made by the Assistant Attorney General, who, in fact, stated that he was not going to uphold police methods if they were in fact as claimed. Furthermore, at page 146 of the Transcript, during the testimony of detective Seth, he admitted that there was a Police Court in the station, but stated that he was not sure whether the *session* is on Saturday (this would be January 7th, 1950), but that he did not believe there was a Police Court *session* on Saturday. He further stated that he made no inquiry to determine whether a *session* of the Police Court was in progress.

Of course, the answer to counsel's question by detective Seth, that he did not know and did not believe that there was a Police Court *session* in progress on Saturday has nothing to do with whether or not a magistrate was available, or could have been made available. I believe the facts, without question, show that the Police did not, and would not make a magistrate available, or even seek one, regardless of whether there was a *session* of the Court in progress during the entire day of Saturday when appellee was continuously interrogated.

Regardless of the argument which counsel makes in assigning error to the Findings of Fact, Nos. 4, 5 and 6, and the Conclusions of Law based thereon, it is perfectly obvious that such findings have clear and substantial support in the evidence heretofore recited in appellee's Statement of the Case. The Appellee showed some minor confusion at times, but certainly none as to the events that actually occurred and to the circumstances that surrounded them. This is clearly indicated by the *undisputed* facts in the record. Apart from some allegations and testimony of the appellee which appellant seeks to controvert by the testimony of detectives Ryan and Thomas, the factual findings have a firm basis in the record. The Court found adversely as to conflict of appellee with Ryan and Thomas. There is abundant evidence to justify the Court's view in its determination of controverted issues in the conflict and implications observable from the manner in which detective Thomas testified in the State Court, as compared with the manner in which he testified in the trial of the issues before the United States Judge. (See Tr. 223-224.) We would be guilty of prolixity if we were to confuse the issue before this Court with a myriad of references to the record, or conclusions derived from isolated questions and answers in the Transcript. It should suffice to say that on the factual issues appellee has recited in his Statement of the Case, which stand undisputed, there is substantial ground for each and every finding of the Court on such facts.

When those undisputed facts are considered in context and perspective with the disputed facts, the findings are fully supported. Appellee sincerely contends that the undisputed facts alone are of such positive persuasion that they establish the claim of the deprivation of Federal due process. Here we have a 45-year-old Filipino with an eighth grade education who had never been in trouble, who had never before been in a police station, who had never before had anything to do with the police, who knew nothing of criminal procedures and nothing of police methods, and who was completely unequipped to meet the coercion which was exercised by the officers of the Seattle Police Department. It is quite appropriate to emphasize that the coercion which the Court examines can be of a physical or psychological character. One can be as deadly as the other in its violation of due process. This record is replete with the exercise of coercion of physical and psychological character, and the undisputed evidence indicates a wilful disregard by the police, for the State laws which should govern their conduct in the handling of matters of this kind. This Court has had occasion to consider the Washington statute which is applicable and has spoken before as to the intendment of that statute.

In *Runnels v. U. S.*, 138 Fed. 2d, 346, the Court stated at Page 348:

> "The United States attorney suggested at the oral argument that it was not certainly known until the confession was obtained whether the killing had occurred on the Reservation, hence the government was in no position to file an accusation until after that time. We think this makes no difference. *While Washington appears to have no statute on the subject, in that state, as elsewhere in this country, it is the duty of a peace officer who has effected an arrest without a warrant promptly to take the person arrested before a magistrate. This directive is not something which the officer is free to comply with or ignore according as he may think the exigencies of the situation demand; it is a fundamental imperative designed to safeguard the individual in a free land against the arbitrary exercise of power.*" (Italics supplied.)

This Court's further consideration of the case suggests the proper definition of the applicable Washington statute in its citation of *Housman v. Byrne*, 9 Wash. 2d, 560; 115 Pac. 2d, 673; and *Ulvestad v. Dolphin*, 152 Wash. 580; 278 Pac. 681.

The recitation by way of argument in the appellant's Brief as to the sympathetic and kind treatment afforded to appellee, from which appellant launches its attack on the Court's findings, is well considered and disposed of by the opinion of this Court in *Gros v. U. S.*, 136 F. 2d, 878.

It is not enough to say that *Gros* can be distinguished by reason of its consideration under Federal procedural rules. The all important element of consideration in

that case is primarily the psychological coercion which was employed, and psychological coercion knows no bounds of procedural limitation or distinction. In *Gros* the prisoner was held in a cell of the F. B. I. in the Field Office Building of the Bureau in Los Angeles, California. He was interrogated over a period of five days, but was not abused and no harm was inflicted upon him other than confinement. The prisoner was regularly taken to a restaurant for his meals and was questioned without rudeness of manner. There was no physical abuse inflicted upon Dr. Gros, but this Court speaking to that situation, stated in part before reversing the conviction:

> " 'Appellant's belief that his imprisonment in the cell seemed like the Gestapo methods of which he had heard in Germany, is based upon a warrantable inference. No stronger facts need be stated to show the lack of evidentiary value in Anglo American jurisprudence of a confession so pressed from a cell-confined man over a period of five days.' "

SPECIFICATIONS OF ERROR 7, 8, 9

C. Answer to specifications of Error Nos. 7, 8, and 9. The answer by way of argument to these specifications of error will likewise include specifically the reasons why appellee believes that this Court should sustain the decision of the Honorable United States District Judge. The United States District Court properly assumed jurisdiction. Appellee here had exhaust-

ed state remedies. See *Giron, et al, v. Cranor,* supra. The same argument which appellant makes here that the District Judge could not reexamine findings of fact of state tribunals was made in the recent case of *U. S. ex rel Elliott v. Hendricks,* 213 F. 2d, No. 5 (advance reports), page 922. In that case the State of Pennsylvania was joined in a Brief by the Attorneys General of forty other states, and the opinion disposes of appellant's objections here about the lack of jurisdiction in the United States Judge. The Court held that the problem for the appellate Court was to determine whether things which had been done in the State Court prosecution were so unfair that the defendant had been deprived of his rights under the Federal Constitution. Appellant contends that the question decided by the United States District Judge was solely a question of fact and that thus a state jury was entitled to determine whether a confession was obtained under the influence of fear produced by threats. Appellant relies almost completely upon decisions of the Supreme Court of the State of Washington as being decisive of this issue. Such is not the law, as Congress has ample authority to authorize the Federal judiciary to test the question of whether one confined under State process is in such confinement deprived of his rights under the Federal Constitution. See *U. S. ex rel Elliott v. Hendricks,* supra.

Likewise, all that is said in *Schechtman v. Foster* (cited by counsel), 172 F. 2nd 339, is that due process of law does not mean infallible process of law. The United States District Judge, in accord with established authority of law, *Elliott v. Hendricks,* supra, could redress violations of the Constitution. Further authority and precedent is established in:

Lisenba v. California, 314 U. S. 219;
Malinski v. New York, 324 U. S. 401, 404.

The Supreme Court of the United States has said in a number of cases that if a coerced confession is admitted in evidence, the judgment of conviction must be set aside, even though the evidence, apart from the confession, might have been sufficient to support a finding of guilt.

Lyons v. Oklahoma, 322 U. S. 596;
Stroebel v. California, 343 U. S. 181;
Malinski v. New York, supra.

Appellant, by way of comparison of the Washington and New York procedure, relies on *Stein v. New York*, 346 U. S. 156 (see page 25 Appellant's Brief). The *Stein* case has been discussed in connection with the Fourteenth Amendment and the Third Degree in a recent article appearing in the *Stanford Law Review.* See: *The Fourteenth Amendment and the Third Degree, Stanford Law Review,* May, 1954; Vol. 6, No. 3. The author of that article suggests that the case raises

anew the entire problem of when the Supreme Court will reverse conviction on "coerced confession" grounds. Under New York procedure (a similar procedure is employed in the State of Washington) if the Court finds that the confession was not voluntary he must exclude it, but where he believes that there is an issue of fact as to whether the confession was coerced, then such confession and the evidence with reference to the manner in which it was obtained may be submitted to the jury under, of course, a cautionary instruction that the confession must not be used in determining guilt or innocence, unless it be found that it was voluntarily given. The trial Judge in the *Stein* case submitted the evidence to the jury after a determination that it was a jury issue. There was substantial evidence other than the confession which pointed to the defendant's guilt. The verdict of guilty was affirmed by the Appellate Court without opinion and it was not possible to determine whether the jury had found the confession to be coerced and rejected it, but found that the other evidence established guilt, or whether the confession had been found to be voluntary and was relied on by the jury in reaching the verdict.

The author in the *Stanford Law Review* treats of apparent difficulties posed by the *Stein case,* but he distinguishes that case by saying that the questioning in *Stein* was only intermittent and that time had been allowed for food and rest between the sessions of ques-

tioning. Although the author thinks that there was in *Stein* a shift in attitude, he does state "some of the results in future decisions will be similar to outcomes of the past." The author in the article concludes that the confession cases are the result of the application of two Constitutional standards. (1) That a conviction cannot stand when based on a confession which has been extracted by police methods which create too great a danger of falsity. With respect to that standard he says that the means used must be considered in relation to the defendant and his probable power of resistance. (2) The author contends that a conviction will be reversed when the confession was obtained by methods which in themselves offend due process, and that in the second no inquiry into the probable falsity is relevant.

It is respectfully contended that the application of the standards suggested would justify support of this Court's affirmance of the opinion of the United States District Judge, even were this inquiry confined to the application of the *Stein* case. The *Stein* case can logically be distinguished. See *Stanford Law Review*, supra, and the discussion of the case by the United States District Judge in the instant cause. (Tr. 225-228 inclusive.) It is suggested, however, that the Supreme Court of the United States has in a recent decision, as indicated by the *Law Week's Summary & Analysis, Pocket Edition*, August 3rd, 1954, No. 78,

withdrawn any arguable position for the appellant's claimed vitality of the *Stein* doctrine as relating to inquiry of a Federal Court under the circumstances of this case.

Leyra v. Denno, -US-., 98 L. ed. (Advance p.-) Vol. 98, No. 16, Advance Reports of the Supreme Court, p. 631 (June 1954), was a case that came up from New York, as did the *Stein* case, and it was a case where certain confessions were submitted to the jury, as in the *Stein case.* In the first trial in *Leyra* the Appellate Court had reversed on the ground of the use of a coerced confession. In the second trial only confessions which followed the first were used, and the trial Court submitted to the jury the question of their voluntariness. Denial of petitioner's writ for habeas corpus was made by the United States District Judge and affirmed by the Court of Appeals for the Second Circuit. The Supreme Court of the United States, per Mr. Justice Black, reversed, holding that the undisputed facts in the case were irreconcilable with petitioner's mental freedom, "to confess to or deny a suspected participation in a crime." The decision of the Supreme Court of the United States in this case makes the proposition undeniable that the philosophy of the Court as to due process which has been consistenly propounded by Mr. Justice Black and Mr. Justice Douglas, and which has been further crystalized by other members of the Court (see *Stanford Law Re-*

view, supra) is still on the side of meticulous protection against untrustworthiness in coerced confessions, regardless of the character of that coercion. The dissent in *Leyra* squarely presents the issue of the effect of the *Stein* case. Mr. Justice Minton, with Mr. Justice Reed and Mr. Justice Burton, dissented, stating specifically:

> "It is not our function to set aside state court convictions on the ground that the verdict is against the weight of the evidence. *Stein v. New York,* 346 U. S. 156, 180, 97 L. ed. 1522, 1540, 73 S. Ct. 1077."

The opinion further states:

> "New York must be mystified in its efforts to enforce its law against homicide to have us say it may not submit a disputed question of fact to a jury. The Court holds that to do so denies due process."

The doctrine contended for by appellant in *Stein* was squarely presented and disposed of. It is respectfully urged that the United States District Judge had the authority, the duty and obligation of deciding this cause; and that in view of the facts and circumstances of this case analyzed in accord with the recent and last ruling of the Supreme Court of the United States, the United States District Judge properly disposed of the matter in accord with the rules and substantive law as defined by the Supreme Court of the United States.

CONCLUSION

We respectfully submit that the Court should affirm the order of the United States District Judge for the reason that the Court had jurisdiction to hear and decide the constitutional question presented and for the further reason that the Court properly decided that question within the limits imposed upon Court inquiry in accord with the authorities heretofore reviewed.

Respectfully submitted,

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No. 14230

United States
Court of Appeals
for the Ninth Circuit

THEODORE ROOSEVELT GLENN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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In the District Court for the Territory of Alaska,
Third Division

Criminal No. 2818

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THEODORE ROOSEVELT GLENN,
Defendant.

INDICTMENT

The grand jury charges:

That sometime during the month of November, 1950, at or near Palmer, Third Judicial Division, Territory of Alaska, Theodore Roosevelt Glenn being over the age of Sixteen (16) years, did carnally know and abuse a female person, to-wit: Eva Nickita of the age of Fifteen (15) years.

Count I.
Section 65-9-10, ACLA, 1949

That sometime during the month of November, 1950, at or near Palmer, Third Judicial Division, Territory of Alaska, Theodore Roosevelt Glenn, did have unnatural carnal copulation by means of the mouth, to wit: the said Theodore Roosevelt Glenn did put his mouth on the private parts of a female, to-wit: Eva Nickita and did then and there agitate his tongue therein.

Count II.
Section 65-9-10, ACLA, 1949

That sometime during the month of November,

1950, at or near Palmer, Third Judicial Division, Territory of Alaska, Theodore Roosevelt Glenn did commit sodomy with a female, to-wit: Eva Nickita, the said Theodore Roosevelt Glenn did then and there insert his penis into the anus of Eva Nickita and did then and there agitate his said penis back and forth in the said anus of the said Eva Nickita.

A True Bill.

/s/ HARRY E. STIVER,
Foreman
/s/ LYNN W. KIRKLAND,
United States Attorney

[Title of District Court and Cause.]

MINUTE ORDER FIXING BAIL

Now at this time on motion of L. W. Kirkland, Assistant United States Attorney,

It Is Ordered that Bail in cause No. 2818 Cr., entitled United States of America, plaintiff, versus Theodore Roosevelt Glenn, defendant, be and it is hereby fixed in the sum of Ten Thousand Dollars ($10,000.00).

Entered in Journal March 12, 1953.

[Title of District Court and Cause.]

ARRAIGNMENT AND SETTING TIME TO PLEAD

Now on this day came L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government, came also the defendant, Theodore Roosevelt Glenn in cause No. 2818 Cr., entitled United States of America, plaintiff, versus Theodore Roosevelt Glenn, defendant, in custody of the United States Marshal and not represented by his counsel; whereupon defendant was brought before the bar of this Court and being asked if he was indicted by his true name and answering that he was, and defendant waiving reading of the indictment, a copy of said indictment, including a list of names of the witnesses appearing before the Grand Jury for the purpose of this indictment, was delivered to said defendant.

Whereupon, said defendant asking time within which to enter his plea or otherwise move against said indictment, the time therefor is set for 10:00 o'clock a.m. of Tuesday, March 31, 1953, and defendant was remanded to the custody of the United States Marshal.

Entered in Journal March 24, 1953.

[Title of District Court and Cause.]

PLEA OF NOT GUILTY

Now on this 31st day of March, 1953, came L. W. Kirkland, Assistant United States Attorney, came also the defendant Theodore Roosevelt Glenn in custody of the United States Marshal, and represented by his counsel, Harold J. Butcher and John Shaw, and said defendant having heretofore and on the 24th day of March, 1953 been duly arraigned, announced to the Court that he is ready to enter his plea herein, is asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, to-wit: Rape; Sodomy, to which defendant says he is not guilty and therefore puts himself upon the Country, and the Assistant United States Attorney, for and in behalf of the Government does the same, and defendant was remanded to the custody of the United States Marshal.

Entered in Journal March 31, 1953.

[Title of District Court and Cause.]

PRAECIPE FOR SUBPOENA ON BEHALF OF UNITED STATES

The Clerk of said Court will issue Subpoena for the following-named persons to appear before said Court, at the United States Court Rooms, in Anchorage, at 9 o'clock, a.m., on the 2nd day of Sep-

tember, 1953, then and there to testify in behalf of the United States:

One (1) subpoena issued in blank.

This 18th day of August, 1953.

Subpoena issued September 2, 1953.

....., United States Attorney

[Endorsed]: Filed August 18, 1953.

[Title of District Court and Cause.]

SUBPOENA

The President of the United States, Greeting:

To: Eva Nickita, Lazy Mountain Home.

You Are Hereby Required, That all and singular business and excuses being set aside, you appear and attend before the District Court, Territory of Alaska, Third Division, to be held in the Court Room of said court at Anchorage, in the Territory of Alaska, on the 2nd day of September, A.D. 1953, at 9:00 o'clock a.m., then and there to testify in the above-entitled cause, now pending in said Court, on the part of the plaintiff, and you are not to depart the Court without leave of the Court. And for failure to attend, as above required, you will be deemed guilty of contempt of Court, and liable to pay the party aggrieved all loss and damage sustained thereby.

Witness, The Honorable George W. Folta, Judge of the said District Court, Territory of Alaska,

Third Division, and the seal of the said Court affixed this 18th day of August, in the year of our Lord one thousand nine hundred and fifty-three and of the Independence of the United States the one hundred and seventy-eighth.

[Seal] M. E. S. BRUNELLE,
Clerk
/s/ By AGNES CURTIS,
Deputy Clerk

Marshal's Return: Return unserved at request of U. S. Attorney.

[Endorsed]: Filed August 28, 1953.

[Title of District Court and Cause.]

PETITION FOR HABEAS CORPUS AD TESTIFACANDUM

To: The Honorable Judge George W. Folta:

The Petition of Lynn W. Kirkland, Assistant United States Attorney for the Third Judicial Division, Territory of Alaska, respectfully represents:

That one David Collins Glascock, imprisoned, in the custody of the Attorney General, being held by his authorized representative, Warden, United States Penitentiary, Steilacoom, Washington.

That David Collins Glascock is in the custody of the Attorney General for Fifteen (15) Months on a charge of interstate transportation of good or articles used in counterfeiting.

That the testimony of the said David Collins Glascock is necessary as a witness for the Government on case entitled, United States of America vs. Theodore Roosevelt Glenn.

Wherefore, your petitioner prays that a writ of Habeas Corpus Ad Testifacandum may be granted and issued directed to the Warden commanding him to produce the body of the said David Collins Glascock before your honor at a time and place therein specified and then and there to appear as a witness for the government in aforementioned case entitled United States of America vs. Theodore Roosevelt Glenn.

Dated at Anchorage, Alaska, this 11th day of September, 1953.

/s/ LYNN W. KIRKLAND,
Assistant United States Attorney

[Endorsed]: Filed September 14, 1953.

[Title of District Court and Cause.]

ORDER

To: Fred P. Wilkinson, Warden, United States Penitentiary, Steilacoom, Washington; Walter E. Huntley, United States Marshal, Anchorage, Alaska; United States Marshal, Western District of Washington:

You are hereby ordered and commanded to produce the body of David Collins Glascock, held in

your custody in the United States Penitentiary under Judgment, Sentence and Commitment of Fifteen (15) months; the said David Collins Glascock to be and appear in the District Court at 10 a.m. on the 21st day of September, 1953, as a witness for the government in the case of the United States of America vs. Theodore Roosevelt Glenn.

Dated at Anchorage, Alaska, this 11th day of September, 1953.

/s/ GEORGE W. FOLTA,
District Judge

Entered in Journal Sept. 14, 1953.

[Endorsed]: Filed September 14, 1953.

[Title of District Court and Cause.]

TRIAL BY JURY

Now on this 23rd day of September, 1953, came L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government, came the defendant in custody of the United States Marshal and with his counsel Harold J. Butcher, and both sides announcing themselves as ready for trial in cause No. 2818 Cr., entitled United States of America, plaintiff, versus Theodore Roosevelt Glenn, defendant, the following proceedings were had, to-wit:

The Deputy Clerk, under the direction of the Court, proceeded to draw from the Trial Jury Box, one at a time, the names of the members of the Regular Panel of Petit Jurors and respective coun-

sel examined and exercised their challenges against said Jurors, so drawn.

At 11:50 o'clock a.m. Court duly admonished the Jurors in the Box, remanded defendant to the custody of the United States Marshal, and continued cause until 2:00 o'clock p.m.

Roll of Jurors

Jessie Highsmith, Laurence Sandison, Esther H. Merly, Julia Simco, Charlotte L. Wells, Mrs. Carl J. Hamacker, David L. Crusey, Ernest Tyler, La Preil Stephan, R. E. Gibson, Aileen Curtis, Rica Swanson, Mrs. J. M. McDonald, Muriel McSparin, Jean E. Cartee, Helen Beauchamp, William Stolt, M. M. Myers, Esther Stoddard, Lyle A. Rilling, Haleen J. Ingalls, Daisy Heaven, Ethel R. Davies, Elisabeth Schneider, Letty F. Otto, Jean Reekie.

Trial Jury

Jean Reekie, Laurence Sandison, M. M. Myers, Julia Simco, Charlotte L. Wells, Muriel McSparin, David L. Crusey, Ernest Tyler, Lyle A. Rilling, Elisabeth Schneider, Letty F. Otto, Rica Swanson.

Now came the Jurors in the Box, who on being called each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel, came also John Shaw, for and in behalf of the defendant, and the trial of cause No. 2818 Cr., entitled United States of America, Plaintiff, versus Theodore Roosevelt Glenn, Defendant, was resumed.

Whereupon the Deputy Clerk, under the direction of the Court, continued to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors so drawn until both sides were satisfied and the Jury complete, consisting of the following named persons, to-wit:

1. Jean Reekie; 2. Laurence Sandison; 3. M. M. Myers; 4. Julia Simco; 5. Charlotte L. Wells; 6. Muriel McSparin; 7. David L. Crusey; 8. Ernest Tyler; 9. Lyle A. Rilling; 10. Elisabeth Schneider; 11. Letty F. Otto; 12. Rica Swanson, which said jury was duly sworn by the Deputy Clerk to well and truly try the matters at issue in the above-entitled cause and a true verdict render in accordance with the evidence and the instructions given by the Court.

At this time L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government moves Court that Count I of indictment be dismissed; motion dismissing Count I of indictment granted.

Opening statement to the Jury was had by L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government.

Opening statement to the Jury was had by Harold J. Butcher, for and in behalf of the defendant.

At 2:55 o'clock Court duly admonished the Trial Jury, remanded the defendant to the custody of the United States Marshal and continued cause to 3:05 o'clock p.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2818 Cr., entitled United States of America, Plaintiff, versus Theodore Roosevelt Glenn, Defendant, was resumed.

At this time L. W. Kirkland, Assistant United States Attorney for and in behalf of the Government moves Court that all minors be excluded from the Courtroom.

Harold J. Butcher, for and in behalf of the defendant moves Court for exclusion of all witnesses until called upon to testify; motion denied.

Eva Nickita, being first duly sworn, testified for and in behalf of the Government.

Harold J. Butcher, for and in behalf of the defendant moves court jury be excused pending arguments on point of law; jury excused in recess for 10 minutes.

Argument to the Court was had by John Shaw, for and in behalf of the defendant.

At 4:10 o'clock p.m. Court continued cause to 4:15 o'clock p.m.

Now came the Trial Jury, upon being recalled, and each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2818 Cr., entitled United States of America, Plaintiff, vs. Theodore Roosevelt Glenn, Defendant, was resumed.

Eva Nickita, heretofore sworn, resumed stand for further cross-examination for and in behalf of the defendant.

David C. Glascock, being first duly sworn, testified for and in behalf of the Government.

Upon motion of L. W. Kirkland, Assistant United States Attorney, jury excused for five minutes pending arguments on point of law.

Argument to the Court was had by L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government.

At 4:50 o'clock p.m. Court continued cause to 4:55 o'clock p.m.

Now came the Trial Jury, upon being recalled, and each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2818 Cr., entitled United States of America, Plaintiff, versus Theodore Roosevelt Glenn, Defendant, was resumed.

David C. Glascock, heretofore sworn, resumed stand for cross-examination for and in behalf of the defendant.

At 5:06 o'clock p.m. Court duly admonished the Trial Jury, remanded the defendant to the custody of the United States Marshal and continued cause to 10:00 o'clock a.m. of Thursday, September 24, 1953.

Entered in Journal September 23, 1953.

Now came the Trial Jury, who on being called,

each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2818 Cr., entitled United States of America, plaintiff, versus Theodore Roosevelt Glenn, defendant, was resumed.

Harold J. Butcher, for and in behalf of the defendant, moves Court for mistrial for reasons of the testimony of the witness David C. Glascock; motion denied.

Jack Jenkins, being first duly sworn, testified for and in behalf of the Government.

Government rests.

Harold J. Butcher, for and in behalf of the defendant, moves Court for directed verdict for and in behalf of the Defendant as to Count III of Indictment.

Jury excused pending arguments on point of law.

Argument to the Court was had by Harold J. Butcher, for and in behalf of the defendant.

Motion denied; Jury recalled.

Mrs. Charlotte Bryant, being first duly sworn, testified for and in behalf of the defendant.

Minnie Nelson, being first duly sworn, testified for and in behalf of the defendant.

Theodore Roosevelt Glenn, being first duly sworn, testified for and in his own behalf.

At 11:00 o'clock a.m. Court duly admonished the Trial Jury, remanded the defendant to the custody of the United States Marshal and continued cause to 11:10 o'clock a.m.

Now came the Trial Jury, who on being called, each answered to his or her name, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2818 Cr., entitled United States of America, plaintiff, versus Theodore Roosevelt Glenn, defendant, was resumed.

Theodore Roosevelt Glenn, heretofore duly sworn, resumed stand for further testimony for and in his own behalf.

At 11:42 o'clock a.m. Court duly admonished the Trial Jury, remanded the defendant to the custody of the United States Marshal and continued cause to 1:45 o'clock p.m.

Now at this time came the Trial Jury, except for Juror Jean Reekie who is excused account of illness and upon the filing of a physician's certificate, and respective counsel having heretofore stipulated that the trial could proceed with less than 12 jurors, came the defendant in custody of the United States Marshal, came also the respective counsel as heretofore and the trial of cause No. 2818 Cr., entitled United States of America, Plaintiff, versus Theodore Roosevelt Glenn, Defendant, was resumed.

Ray Lancaster, being first duly sworn, testified for and in behalf of the defendant.

The defendant rests.

Jack Jenkins, heretofore sworn, resumed stand for further testimony for and in behalf of the Government.

Oscar Olson, being first duly sworn, testified for and in behalf of the Government.

David C. Glascock, heretofore sworn, resumed stand for further testimony for and in behalf of the Government.

The Government rests.

The Defendant rests.

Opening argument to the Jury was had by L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government.

Argument to the Jury was had by John Shaw, for and in behalf of the defendant.

Argument to the Jury was had by Harold J. Butcher, for and in behalf of the defendant.

Closing argument to the Jury was had by L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government.

Whereupon the Court read his instructions to the Trial Jury and Thomas Merton and C. J. McKinney were duly sworn by the Deputy Clerk as bailiffs in charge of said Jurors, and at 3:23 o'clock p.m. the Trial Jury retired in charge of their sworn bailiffs to deliberate upon their verdict, with instructions for a sealed verdict.

Entered in Journal September 24, 1953.

[Title of District Court and Cause.]

PROPOSED INSTRUCTION TO THE JURY DEFINING THE CRIME OF SODOMY

When the crime of sodomy is committed, as alleged in Count III of the Indictment, upon the person of a human being, the crime against nature consists of the penetration of the anus of one person by the sexual organ of another. The jury, in order to convict the defendant of sodomy, must find from the evidence that the defendant, Theodore Roosevelt Glenn, did sometime during the month of November, 1950, insert his penis into the anus of Eva Nikita; otherwise, the defendant must be acquitted.

[Endorsed]: Filed September 24, 1953.

[Title of District Court and Cause.]

SUBPOENA DUCES TECUM

The President of the United States of America, Greeting:

To: May Carter, United States Commissioner Wasella Precinct:

You Are Hereby Required, That all and singular business and excuses being set aside, you appear and attend before the District Court, Territory of Alaska, Third Division, to be held in the Court Room of said court at Anchorage, in the Territory of Alaska, on the 24th day of September, A.D.,

1953, at 10:00 o'clock a.m., then and there to testify in the above-entitled cause, now pending in said Court, on the part of the defendant, and you are not to depart the Court without leave of the Court and you are to bring with you the death certificate of one Little Nickita and any other document pertaining to the death of the said Little Nickita which may be in your records, also any and all books of record which may be in your possession showing the registrations of births from 1933 to 1940.

And for failure to attend, as above required, you will be deemed guilty of contempt of Court, and liable to pay the party aggrieved all loss and damage sustained thereby.

Witness, The Honorable George W. Folta, Judge of the said District Court, Territory of Alaska, Third Division, and the seal of the said Court affixed this 23rd day of September, in the year of our Lord one thousand nine hundred and fifty-three and of the Independence of the United States the one hundred and seventy-eight.

[Seal] M. E. S. BRUNELLE,
Clerk
/s/ By ADELINE STOSKOPF,
Deputy Clerk

Marshal's Return attached.

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

SUBPOENA

The President of the United States of America, Greeting:

To: Emil Nelson, Minnie Nelson, Catherine Theodore, Dick Nikita, Robert Nickita, Nick Stephan:

You Are Hereby Required, That all and singular business and excuses being set aside, you appear and attend before the District Court, Territory of Alaska, Third Division, to be held in the Court Room of said court at Anchorage, in the Territory of Alaska, on the 24th day of September, A.D., 1953, at 10:00 o'clock a.m., then and there to testify in the above-entitled cause, now pending in said Court, on the part of the defendant, and you are not to depart the Court without leave of the Court. And for failure to attend, as above required, you will be deemed guilty of contempt of Court, and liable to pay the party aggrieved all loss and damage sustained thereby.

Witness, The Honorable George W. Folta, Judge of the said District Court, Territory of Alaska, Third Division, and the seal of the said Court affixed this 23rd day of September, in the year of our Lord one thousand nine hundred and fifty-three

and of the Independence of the United States the one hundred and seventy-eighth.

[Seal] M. E. S. BRUNELLE,
Clerk
/s/ ADELINE STOSKOPF,
Deputy Clerk

Marshal's Return attached.

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

SUBPOENA

The President of the United States of America, Greeting:

To: Jane Doe Bryant, Lazy Mountain Home, near Palmer, Alaska:

You Are Hereby Required, That all and singular business and excuses being set aside, you appear and attend before the District Court, Territory of Alaska, Third Division, to be held in the Court Room of said court at Anchorage, in the Territory of Alaska, on the 24th day of September, A.D., 1953, at 10:00 o'clock a.m., then and there to testify in the above-entitled cause, now pending in said Court, on the part of the defendant, and you are not to depart the Court without leave of the Court, and you are to bring with you any and all records in possession of said Lazy Mountain Home pertaining to the entrance into said home and the presence

there of one Eva Nikita. And for failure to attend, as above required, you will be deemed guilty of contempt of Court, and liable to pay the party aggrieved all loss and damage sustained thereby.

Witness, The Honorable George W. Folta, Judge of the said District Court, Territory of Alaska, Third Division, and the seal of the said Court affixed this 23rd day of September, in the year of our Lord one thousand nine hundred and fifty-three and of the Independence of the United States the one hundred and seventy-eighth.

[Seal] M. E. S. BRUNELLE,
Clerk
/s/ By ADELINE STOSKOPF,
Deputy Clerk

Marshal's Return attached.

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

You were accepted as jurors in reliance upon your answers to the questions asked you concerning

your qualifications. You are just as much bound by those answers now and until you are finally discharged from further consideration of this case as you were then. The oath taken by you obligates you to well and truly try this case and a true verdict render according to the law and the evidence, without allowing yourselves to be swayed by passion, sympathy, prejudice or like emotion.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

No. 2

Since the dismissal of Count I of the Indictment in this case, the remaining counts have been renumbered for the purpose of this trial, Nos. I and II.

By Count I, the defendant is accused of the offense of unnatural carnal copulation by means of the mouth with Eva Nickita, and by Count II with the crime of sodomy upon Eva Nickita by means of

her anus. It is alleged that both offenses were committed in the month of November, 1950, at or near Palmer.

The law of Alaska defines these offenses as follows:

> "That if any person shall commit sodomy, or the crime against nature, or shall have unnatural carnal copulation by means of the mouth, or otherwise, either with beast or mankind of either sex, such person, upon conviction thereof, shall be punished".

Carnal copulation means sexual connection.

No. 3

If you find from the evidence beyond a reasonable doubt that at or about the time and place stated, the defendant had unnatural carnal copulation with Eva Nickita by placing his mouth upon her private parts for the purpose of gratifying passion, you should find him guilty under Count I. But if you do not so find or have a reasonable doubt thereof, you should acquit him under Count I.

Likewise, if you find from the evidence beyond a reasonable doubt that at or about the time and place alleged, the defendant inserted his penis into the anus of Eva Nickita, you should find him guilty of the crime charged in Count II. But if you do not so find or have a reasonable doubt thereof, you should acquit him under Count II.

No. 3½

In any criminal case previous good character of

the accused may be shown by evidence that his general reputation in the community in which he lived was good. General reputation consists of what the people of the community generally think or say of another and, hence, anyone who knows what the general reputation of a person is in the community in which he lives may testify thereto. But the testimony must be based not on what a few people say but on what people generally say. However, evidence that the general reputation of one accused of crime has never been discussed in the community in which he lives is also admissible on the theory that one whose general reputation has not been the subject of discussion may be presumed to bear a good reputation.

Evidence of good reputation is admitted not for the purpose of showing that the one accused did not commit the crime charged but for the purpose of showing the improbability that he would do so. It is for you to say whether the defendant's good general reputation in Palmer prior to the commission of the offense charged has been proved. If you find that it has, you may consider it along with all the other testimony and give it such weight as you think it entitled to, remembering that persons of good character may nevertheless commit crimes.

No. 4

The law presumes every person charged with crime to be innocent and, hence, the defendant is entitled to the benefit of this presumption until it has been overcome by evidence beyond a reasonable

doubt. This rule as to the presumption of innocence is a humane provision of the law intended to guard against the conviction of innocent persons, but it is not intended to prevent the conviction of any person who is in fact guilty or to aid the guilty to escape punishment.

No. 5

The burden of proving the offense charged beyond a reasonable doubt is on the prosecution. Whether this burden of proof is sustained is to be determined by you from all the evidence in the case, and not merely from the evidence introduced on behalf of the prosecution.

No. 6

A reasonable doubt is not just any vague, fanciful or imaginary doubt, but one that arises after a careful consideration of all the evidence or from a lack thereof. It is a doubt based on reason, and not on a bare possibility of innocence, or on sympathy or a desire to escape from an unpleasant duty. Everything relating to human affairs and depending on human testimony is open to some possible doubt, and this is true of guilt.

If after carefully analyzing, comparing and weighing all the evidence, you have a settled conviction or belief of defendant's guilt, amounting to a moral certainty, such as you would be willing to act upon in matters of the highest importance relating to your own affairs, then you have no reasonable doubt.

No. 7

Subject to the law as contained in these instructions you are the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence. Evidence includes not only all the facts testified to or established by the exhibits, but also all reasonable inferences which may be deduced therefrom. What facts have been proved and what inferences may be deduced therefrom is for you to determine. The term "witnesses" as used in this instruction includes the defendant.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean

that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on opposing sides, and that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case.

In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair or evasive, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, his character as shown by the evidence, the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on his credibility and the weight of his testimony.

A witness may be impeached by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence. A witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testi-

mony as to any matter material to this case; or by proof that he has been convicted of a crime. However, the impeachment of a witness does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine. A witness wilfully false in one part of his testimony may be distrusted in other parts. Discrepancies in a witness' testimony or between his testimony and that of other witnesses, if any, do not necessarily mean that the witness should be discredited. Failure of or a mistaken recollection is a common experience. It is a fact, also that two persons witnessing an incident or a transaction rarely agree on the details especially with regard to time, distance, etc. You should not, therefore, be misled by discrepancies in unimportant matters or in testimony which is immaterial to the question of guilt or innocence. But a wilful falsehood always is a matter of importance and should be seriously considered. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should apply the tests stated and give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are not bound to believe something to be a fact merely because a witness has stated it to be a fact, but you are to determine the fact by applying the tests stated in this instruction. And where witnesses directly contradict each other on any ma-

terial matter, and are the only ones who have testified thereto, you are not to consider the evidence evenly balanced or such matter not proved but you should ask yourselves what motive the one had for testifying as he did, and what motive the other had for testifying to the opposite, and after applying the tests referred to and considering all the evidence, determine whom to believe.

Finally, you may, in determining any question, resort to the sound common sense and experience which you use in the ordinary affairs of life. Also, in addition to drawing inferences and conclusions from the evidence you may consider such matters of common knowledge as are not disputable.

No. 8

I also instruct you that you should not concern yourselves with the matter of punishment. That is the exclusive concern of the Court. You are not responsible for the consequences of your verdict but only for its truth so far as the truth is determinable by you. When you have arrived at a verdict in accordance with these instructions, you need not submit to any questioning as to how you reached your verdict or what occurred in the jury room except in a proper proceeding in this Court.

No. 9

Proof that any witness has been convicted of crime, may be taken into consideration in determining his credibility and the weight and value you will give to his testimony.

No. 10

The law makes the defendant in a criminal action a competent witness. *It* determining his credibility, you have a right to take into consideration the fact that he is the defendant and that his interest in the result of your verdict is usually greater than that of any other witness, and give his testimony, considered in connection with all the other evidence, such weight as you believe it entitled to.

No. 11

Jurors are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so, so that there may be an end to litigation. In each case the verdict must be unanimous. But while the verdict should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference and discussion in the jury room. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors. The very object of the jury system is to secure unaniminity by a comparison of the views of, and by discussion and argument among, the jurors, themselves. Hence, while no juror should yield a sincere conviction founded upon the evidence and the law as laid down in these instructions merely to agree with the jury, every juror, in considering the case with fellow jurors, should lay aside all undue pride and vanity of personal opinion and

listen, with a disposition to be convinced, to the opinions and arguments of the others and a desire to get at the truth in order that a just verdict, representing the judgment of the entire jury, may be reached.

Accordingly, no juror should hesitate to change the opinion he has entertained or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

No. 12

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and, therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

No. 13

Upon retiring to your jury room you will select one of your number foreman, who will preside over your deliberations and be your spokesman in court.

You will take with you to the jury room these instructions and one form of verdict. If you find the defendant guilty, you will draw a line through the blank space before the word "guilty"; but, if you do not so find, you will write the word "not" in such blank space.

If you unanimously agree upon a verdict during business hours, that is between 9 a.m. and 5 p.m., you should have your foreman fill in, date and sign it and then return with your verdict immediately into open court, together with these instructions. If, however, you do not agree upon a verdict until after 5 p.m. one day and before 9 a.m. the following day, the verdict, after being similarly filled in, dated and signed, must be sealed in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the Court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

If it becomes necessary during your deliberations to communicate with the Court, you may do so by having the bailiff deliver a written message but you must not in such message, or otherwise reveal to the Court or any person how the jury stands on the question of guilt or innocence.

Given at Anchorage, Alaska, this 24th day of September, 1953.

/s/ GEORGE W. FOLTA,
District Judge

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Now at 10:00 o'clock a.m. came the Trial Jury, in charge of their sworn bailiff, who, on being called, each answered to his or her own name, came L. W. Kirkland, Assistant United States Attorney, came also the defendant in custody of the United States Marshal, came the respective counsel as heretofore, and said Jury did present by and through their Foreman in open Court their verdict in cause No. 2818 Cr., entitled United States of America, Plaintiff, versus Theodore Roosevelt Glenn, Defendant, which is in words and figures as follows, to-wit:

Verdict

[Title of Cause.]

We, the Jury, duly impanelled and sworn to try the above entitled cause, find the defendant guilty as charged in Count I of the Indictment, and not guilty as charged in Count II of the Indictment.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

/s/ David L. Crusey, Foreman

[Endorsed]: Filed September 25, 1953.

which verdict the Court ordered filed and the Jury was excused indefinitely and upon notice of 10 days, and defendant remanded to custody of the United States Marshal.

Entered in Journal September 25, 1953.

[Title of District Court and Cause.]

M. O. SETTING TIME FOR PRONOUNCING SENTENCE

Now at this time upon the Court's own motion,

It Is Ordered that time for pronouncing sentence in cause No. 2818 Cr., entitled United States of America, Plaintiff, versus Theodore Roosevelt Glenn, Defendant, be, and it is hereby set for 10:00 o'clock a.m. of Saturday, September 26, 1953.

Entered in Journal September 25, 1953.

[Title of District Court and Cause.]

M. O. PRONOUNCING SENTENCE

Now at this time came L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government, came also the defendant, in custody of the United States Marshal, and with Harold J. Butcher, of his counsel, and this being the time heretofore set for pronouncement of sentence in cause No. 2818 Cr., entitled United States of America, plaintiff, versus Theodore Roosevelt Glenn, defendant, the following proceedings were had, to-wit:

Statement to the Court was had by L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government.

Statement to the Court was had by Harold J. Butcher, for and in behalf of the defendant.

The Court now pronounces judgment of three and one-half years in whichever institution may be designated by the Attorney General, against said defendant and directs the Assistant United States Attorney to prepare and submit written judgment and commitment in accordance with the oral judgment given herein, and defendant was remanded to the custody of the United States Marshal.

Entered in Journal September 26, 1953.

In the District Court for the Territory of Alaska,
Third Division

Criminal No. 2818

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THEODORE ROOSEVELT GLENN,
Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 26th day of September, 1953, came Lynn W. Kirkland, Assistant United States Attorney, the attorney for the government, and the defendant, Theodore Roosevelt Glenn, appeared in person and by his counsel, Harold J. Butcher, Esquire, and John Shaw, Esquire.

It Is Adjudged that the defendant, Theodore Roosevelt Glenn, has been convicted upon his plea of not guilty and a verdict of guilty of the offense of sodomy as charged in Count II of the Indictment on file herein; and the Court having asked the defendant, Theodore Roosevelt Glenn, whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant, Theodore

Roosevelt Glenn, is hereby committed to the custody of the Attorney General or his authorized representative for a period of Three and One-Half (3½) years, said sentence to commence and begin on the 26th day of September, 1953, and that said defendant stand committed until said sentence is served.

It Is Ordered that the Clerk deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in open Court at Anchorage, Alaska, this 26th day of September, 1953.

/s/ GEORGE W. FOLTA,
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed September 26, 1953.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

The above named defendant moves the Court to grant him a new trial for the following reasons:

(1) That the Court erred in denying the defendan't Motion for Acquittal, made at the time the government rested its case.

(2) That the verdict is contrary to the weight of the evidence.

(3) That the verdict is not supported by sub-

stantial evidence, and the testimony of the complaining witness is not corroborated.

(4) That the Court erred in refusing to allow the defendant to cross-examine the complaining witness on incidents of previous unchastity with other persons.

(5) That the Court erred in refusing to permit the defendant to cross-examine the complaining witness as to previous false statements made to the Grand Jury and other persons regarding her age.

(6) That the Court erred in permitting the witness, Glasscock, to testify of other offenses occurring since the defendant was indicted.

(7) That the Court erred in permitting the District Attorney to elicit from the witness, Glasscock, in the presence of the jury, reference to the crime of "murder", on which the defendant has been previously indicted and on which he has not stood trial.

(8) That the Court erred in denying defendant's motion for a mis-trial.

(9) That the Court erred in instructing the jury as charged in Instruction No. IV.

(10) That the Court erred in permitting the prosecuting attorney, in his closing argument, to refer to other offenses not in evidence.

Dated at Anchorage, Alaska, this 29th day of September, 1953.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed September 29, 1953.

[Title of District Court and Cause.]

M. O. DENYING MOTION FOR NEW TRIAL

Now at this time upon oral motion of Harold J. Butcher, counsel for defendant in cause No. 2818 Cr., entitled United States of America, Plaintiff, versus Theodore Roosevelt Glenn, Defendant, and with Lynn Kirkland, Assistant United States Attorney consenting thereto, motion for new trial submitted to the Court without argument.

Whereupon the Court denied motion for new trial in the above entitled cause.

Entered in Journal December 4, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Theodore Roosevelt Glenn, Appellant, was convicted, by verdict of jury impaneled to hear said case, on Count number two of the Indictment, and was thereafter, on the 26th day of September, 1953, sentenced to serve a term of three and one-half years on said judgment of conviction.

Said appellant was removed, without notice to his attorney, from the Federal Jail in Anchorage, Alaska, where he had elected to remain pending appeal, to the United States Jail at Seattle, Washington, and thereafter removed to the United States Prison at Leavenworth, Kansas, where appellant is now located.

Wherefore: I, Harold J. Butcher, one of the attorneys for said appellant, hereby appeal on behalf of said appellant to the United States Court of Appeals for the Ninth Circuit, from the above stated judgment.

Dated at Anchorage, Alaska, this 7th day of December, 1953.

/s/ HAROLD J. BUTCHER,
One of Attorneys for the Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed December 7, 1953.

[Title of District Court and Cause.]

MOTION

Comes now Harold J. Butcher, one of the attorneys for Theodore Roosevelt Glenn and, pursuant to Rule No. 40, Federal Rules of Criminal Procedure, moves this Honorable Court to extend the time for docketing the record in the appeal of the above named appellant for thirty days.

This motion is based upon the Affidavit of the undersigned and other documents and papers filed herein.

Dated at Anchorage, Alaska, this 18th day of January, 1954.

/s/ HAROLD J. BUTCHER,
One of Attorneys for Defendant.

[Endorsed]: Filed January 18, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Harold J. Butcher, being first duly sworn, upon oath deposes and says:

That he is one of the attorneys for Theodore Roosevelt Glenn, the above named defendant; that, on or about the 7th day of December, 1953, he filed a Notice of Appeal in the above captioned case and within the ten-day period allowed under the Federal Rules of Criminal Procedure; and that thereafter he was unable to order the transcript of record of the trial proceedings, for the reason that the appellant was confined to the United States Prison at Leavenworth, Kansas, and that the matter of sufficient monies necessary to pay the cost of such transcript and have the same prepared was uncertain; and that, thereafter when the undersigned was able to arrange for sufficient funds for payment of said transcript, he ordered said transcript, which transcript was not delivered until a few days prior to the date on which said record was required to be docketed in the United States Court of Appeals for the Ninth Circuit on appeal.

Affiant further states that, in accordance with the provisions of Rule 39-c, he had until midnight of the 16th day of January, 1954, to mail said transcript of record for docketing purposes to the United States Court of Appeals but was unable,

because of the delay in the receipt of the transcript, to have the same sufficiently preparing for docketing, and for the further reason that the Court was not in session on the 16th day of January, it being Saturday, and he was unable to appear in open Court to seek an extension of time sufficient to file and docket the case by midnight of Saturday, January 16, 1954.

For the foregoing reasons and on the ground of excusable negligence, it is respectfully requested that the Court grant the extension of time requested in the motion filed by the undersigned, and issue the order submitted herewith.

Dated at Anchorage, Alaska, this 18th day of January, 1954.

/s/ HAROLD J. BUTCHER,
One of Attorneys for Theodore R. Glenn

Subscribed and Sworn to before me this 18th day of January, 1954.

[Seal] /s/ VIOLA G. GREEN,
Notary Public in and for Alaska. My commission expires 8-29-56.

[Endorsed]: Filed January 18, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND DOCKET THE RECORD ON APPEAL

Upon consideration of the motion of one of the attorneys for appellant for an order extending time to file and docket the record on appeal in the United States Court of Appeals for the Ninth Circuit, and good cause therefor appearing;

It Is Hereby Ordered that the time in which the appellant may file and docket the record on appeal in the United States Court of Appeals for the Ninth Circuit be and it is hereby extended to and including the 17th day of February, 1954.

Dated at Anchorage, Alaska, this 18th day of January, 1954.

/s/ JOHN CORREY, JR.,
District Judge

[Endorsed]: Filed January 18, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75 of the Rules of Civil Procedure as applicable in appeals from conviction under Federal Rules of Criminal Procedure, the defendant-appellant hereby designates for the record on appeal the entire record from the Indict-

ment to the Judgment of Conviction and Sentence, including the transcript of the trial proceedings, copy of which is attached hereto.

/s/ HAROLD J. BUTCHER,
Attorney for Defendant-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed February 5, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Wm. A. Hilton, Clerk of the above entitled Court do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above entitled action or proceedings, and including specifically the complete record and file of such action, and including the bill of exceptions setting forth all the testimony taken at the trial of the cause, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled cause by the above entitled Court on September 26, 1953 to the United

States Court of Appeals at San Francisco, California.

[Seal] /s/ WM. A. HILTON,
Clerk of the District Court for the Territory of Alaska, Third Division.

In the District Court for the District of Alaska, Third Division

Criminal No. 2818

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THEODORE ROOSEVELT GLENN,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Anchorage, Alaska, Sept. 23, 1953, 11 a.m.

Before: The Honorable George W. Folta, U. S. District Judge.

Appearances: For the Plaintiff: Seaborn J. Buckalew, United States Attorney, Lynn W. Kirkland, Assistant United States Attorney, Third Division, Territory of Alaska. For the Defendant: Theodore Roosevelt Glenn, Defendant in person, and Harold J. Butcher and John Shaw, Attorneys for Defendant. [1*]

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* Page numbering appearing at the top of page of original Reporter's Transcript of Record.

The Court: I assume the parties are ready in this case?

Mr. Kirkland: The Government is prepared.

The Court: You may proceed.

Mr. Butcher: The defendant is ready but I have a couple of matters I wish to get into the record, your honor. We have been under the difficulty of attempting to ascertain when this case would go on from day to day and, therefore, our subpoenaing of witnesses has been based on our own estimation and such information as we could glean from the court as to when this case would go on. We checked yesterday, both with the secretary and the lawyers who were engaged in the previous trial, and it was believed by them and also by Miss Jensen that this case would be argued—the case just past—would be argued this morning and we would get to our case this afternoon. Assuming then that the drawing of the jury panel and at least the presentation of the case would consume the afternoon we have subpoenaed approximately seven witnesses for tomorrow morning. Mr. Kirkland now tells me that he has only two witnesses he intends to call and I had previously understood that he had approximately five. So, therefore, it may be that we will not have our witnesses available this afternoon, through no fault of our own, but we will proceed as far as we can and the Government can go ahead with its case. But it may be this afternoon if the [4] Government rests, we will be without a witness.

Our witnesses, I might say, your honor, are natives—all of them with two exceptions who are to

be brought in on technical proof only—they are natives whom we have had considerable difficulty with through the use of liquor and it was impossible to bring them into town from day to day pending the commencement of this case. We have had to do the best we could under the circumstances and determine when to subpoena them. It was our best judgment that tomorrow morning was the logical time.

The Court: I do not know how you received that information out of my office because I told my secretary that we would be at this case by 10:00 o'clock this morning. I told her that yesterday.

Mr. Butcher: I talked to your secretary yesterday in the presence of Louise, the Clerk. She estimated it would be—probably be noon. That was at two or three o'clock.

The Court: Well, we will proceed and see how we get along.

Mr. Butcher: I have another matter. I have just examined the list of jurors and out of a list of 33 jurors I find that there are six or seven—I am not sure of the number because in some cases I am not sure of the female name—there are six or seven men out of a panel of 33. Now, this particular case in my own opinion as a practicing lawyer is a case in which [5] the evidence will be of such a nature that if it were possible I would like to have it tried by male, all male jury. That being impossible I believe the defendant is entitled to have at least an equal number of men on the panel as women from which to draw a jury. Now, I understand, your honor, I believe that women make fine jurors but

I also believe that certain sordid things that might come out in evidence shock a woman more than they do a man. In our christian way of life and the rearing of our women they are more shocked and more sensitive to things pertaining to sex and other sordid types of conduct than a man is and I wish to, for the record, make an objection to the panel on the grounds that the number of women on the panel greatly outnumber the men and that it is not a good panel or a proper panel from which to draw a fair and impartial jury.

The Court: Well, I do not think you are entitled to have anybody on the jury that is particularly hardened but I do not think there is any question but that it may be doubted to be a representative cross section of the community. But that is a condition of living up here that you cannot get men jurors.

Mr. Butcher: Your honor, when the names are drawn ordinarily to subpoena the panel we used to get about the same number of men as we would women; that is the law of averages. In this case I am wondering if men have not been excused from the panel due to reasons that have appeared logical to the court [6] previously, so that we now have a panel composed almost entirely of women.

The Court: Well, I do not know what has been done heretofore. I have very sparingly excused men from the jury but I am not going to compel them to lose $20.00 or $25.00 a day by serving on the jury when they have fixed obligations they must meet. It is just a case where the Government does

not pay enough to enable the court to compel men to serve at such a sacrifice.

Mr. Butcher: It is part of their civic duty, your honor, regardless of sacrifice.

The Court: A person cannot live on civic duty. It simply would be very unfair to compel a person, as I say, who has fixed obligations. It is a typical story the court hears all the time. I have to meet payments of $200.00 a month on my house; I have to meet payments of so much on my car and I have so many children and I cannot live on $7.00 a day. So the court is not going to compel them to serve under those circumstances.

The Court: You may proceed to impanel the jury.

Whereupon, the Deputy Clerk proceeded to draw from the trial jury box, one at a time, the names of the members of the regular jury panel of petit jurors and counsel for both plaintiff and defendant examined and exercised their challenges against said [7] jurors, until the jury of twelve jurors was complete, and counsel for plaintiff and counsel for defendant stipulated that a verdict of less than twelve jurors may be received in case of illness, disability, or other good cause for excusing one of the jurors and that it is, therefore, unnecessary to draw the names of alternate jurors in the cause. Whereupon said jury was duly sworn to well and truly try the cause and a true verdict render in accordance with the evidence and the instructions of the court.

(Before completion of the examination of the

trial jury and before the challenges were exercised by counsel for the parties, the court recessed at 11:47 o'clock a.m., September 23, 1953, first duly admonished the trial jury and the panel, and reconvened at 2:05 o'clock p.m., September 23, 1953, at which time, counsel for plaintiff being present and defendant being present in person and by his counsel, the selection of the trial jury continued and was completed, as above indicated, and thereupon the trial of said cause was resumed:)

The Court: You may make your opening statement.

Mr. Kirkland: If the court please, I would like to make a motion as to Count I of this indictment. I do not think it would be necessary to exclude the jury because I do not see how the defendant could be prejudiced by it. [8]

The Court: Well, it is never improper to make a motion in the presence of the jury if you do not argue it.

Mr. Kirkland: Your honor, I move that Count I of the indictment——

Mr. Butcher: Your honor, I may decide to argue it. I do not know. What is the motion?

The Court: We can pass on it then, if you decide to argue.

Mr. Kirkland: I move to dismiss Count I, that charges the crime of statutory rape for the reason that my witness in this case, after making a closer check of what few records we have, the Native Service records show that this witness was born in 1933. This witness at the time she discussed this

case with me thought she was born in 1935. She was confused with her brother's birthday. She now, after checking with her family—what family she has and people that have known her—has ascertained that she was born in 1934 and she would be a few months above the statutory age.

The Court: The count will be dismissed, leaving the second and third counts. You may make your opening statement.

Opening statement to the jury was made by Mr. Lynn W. Kirkland, Assistant United States Attorney, on behalf of the plaintiff.

Mr. Butcher: Your honor, before I make my opening [9] statement I want to call attention to the fact that the District Attorney's motion has caught us completely by surprise. We had no indication whatever that he intended to make it and I am sure that he had previously decided to make such a motion and has now put us or defendant to a great and considerable expense of subpoenaing a group of natives in to the court from Eklutna who all are fully aware of the girl's age at the time this alleged offense was supposed to have occurred. I think the Government has been derelict in informing counsel on the other side of their disinclination to go ahead with this particular charge.

The Court: It seems to be a common occurrence. I agree with you that the moment that a party to any litigation discovers that there will be a change of that kind made every one should be apprised but, as I say, that is a common occurrence, particularly in this court. There have been times we

would all be in court and the jury here and the cause could have been settled out of court and there is just another $400 or $500 in jury fees wasted.

Mr. Kirkland: If it please the court, I only learned of this this morning and I informed counsel for the defendant in the hall before we came in to seelct this jury. There is some error there.

Mr. Butcher: Counsel informed me that he did not think he could make the first count stick. He thought he could not [10] make a case out of it. He did not say he was going to dismiss. I asked him if he was interested in dismissing it. On certain considerations I might be willing to concede and he was not and that was the last word we had on the subject.

Mr. Kirkland: I think this is pointless going on. I told counsel I certainly would not dismiss counts II and III. I told him I had learned of the age and he said, yes, he had the witnesses who would testify that this girl was over the age of 16 and it was very clear, in my opinion.

The Court: I do not see any reason for further argument in the absence of any statute that would give the right to the other party to accumulate costs and in any event the costs could not be assessed against the United States.

Mr. Butcher: That is perfectly true, your honor. The only thing I wanted to say is that by the slightest effort and slightest examination— by going to the source where the girl resided, where she lived —all this could have been found without the slightest trouble, which we were able to find out with

hardly any effort. I will proceed with the opening statement.

Opening statement to the jury was made by Mr. Harold J. Butcher on behalf of the defendant.

The Court: The court will be in recess for ten minutes. [11]

(After a short recess court re-convenes and the following proceedings were had:)

Mr. Kirkland: May it please the court, before we proceed any further I would like to ask that all minors be excluded from the courtroom during the hearing of this case other than the witnesses.

The Court: Owing to the nature of the case all minors will be excluded from the courtroom. The bailiff and the United States Marshal will see that this order is carried out.

Now, as I understand it, you only have two witnesses?

Mr. Kirkland: That is correct, possibly a third. I am not sure—two for my case unless there is rebuttal to come up.

The Court: Well, it may be that it will take the rest of the day and, therefore, you will have your witnesses on time anyhow.

Mr. Butcher: Yes, thank you, your honor.

Mr. Kirkland: If it doesn't I have other crimianl matters I would gladly like to bring before the court.

The Court: Well, the court does not like business. You may call your first witness.

Mr. Butcher: Your honor, I have a motion to make prior to the calling of the first witness. I

move that the court exclude from the courtroom at this time all persons who may testify or intend to testify in this case. My reason for [12] making this motion is that I think it is most unfair to this defendant or any other defendant to take the stand after witness after witness gets on the stand and tells their story so that all those within the hearing of the story can thus amplify their story and the story they tell is sometimes not their own. I have a most eminent authority on the subject, your honor, if you care to have it cited.

The Court: No need to; the motion is denied.

Mr. Kirkland: It makes no difference; my other witness is in my office with the Marshal.

Mr. Butcher: May I, for the record, cite the authority?

The Court: No, I have gone into it myself and I am satisfied it is within the discretion of the court.

Mr. Butcher: Would your honor hear a very brief three or four lines subject on the matter?

The Court: No.

Mr. Butcher: May I pass the book to your honor?

The Court: You may do that and I will read it some other time.

Mr. Butcher: May I take exception, your honor?

The Court: Proceed.

Mr. Kirkland: I would like to call Eva Nickita.

EVA NICKITA

called as a witness on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. Will you state your name, please?

A. My name is Eva Nickita.

Mr. Butcher: Cannot hear the witness, your honor.

Q. Where do you live, Eva; where do you reside? A. Palmer, Alaska.

Mr. Butcher: Your honor, I am unable to hear the witness from here.

The Court: You will have to speak louder and if you find it difficult to speak louder, you can just speak into the microphone. It will have to be one or the other.

Q. Where did you live during 1950, Miss Nickita, during the winter months of 1950?

A. I lived at Eklutna.

Q. And were you living at Eklutna during the month of November, 1950?

A. No, I lived at Glenn's house in winter of 1950.

Q. I beg your pardon, please?

A. I live at Glenn's house in November of 1950.

Q. At Ted Glenn's house during November of 1950?

The Court: You should refer to him as the defendant [14] and there won't be any confusion.

Q. At the defendant's house in 1950?

(Testimony of Eva Nickita.)

Mr. Butcher: Your honor, to refer to the defendant and to the house as the defendant's would be to lead the witness. The right is for her to tell her own story and tell where she lived, not to be led by suggestions from counsel and I would suggest to him he is leading the witness.

The Court: You should object when the leading question is asked; no question before the court.

Mr. Butcher: I thought your honor suggested.

The Court: I suggested for future guidance. It is improper at any time to call any of the parties by name here.

Q. (By Mr. Kirkland): Miss Nickita, do you know the gentleman who is sitting at the end table over there in the dark suit? A. Yes.

Q. And what is that gentleman's name?

A. Ted Glenn.

Q. When did you first see Mr. Glenn?

A. In 1950 at Eklutna.

Q. In 1950 at Eklutna? A. Yes.

Q. Now, will you tell the court and jury what took place when you first met Mr. Glenn?

A. Well, Charlie Rosseau and Ted came there at Eklutna about midnight at night and they came over to my aunt's house. [15]

The Court: You better put that microphone within about that distance (indicating 3 inches) of your mouth and speak into it.

Mr. Kirkland: Excuse me, your honor, might I approach the witness and lower the microphone?

The Court: Yes.

(Testimony of Eva Nickita.)

Mr. Kirkland: Probably be easier for her. (Thereupon the microphone was lowered.)

Q. (By Mr. Kirkland): Miss Nickita, I will ask you to repeat these questions, someone might not have been able to have heard your answers. Now, when did you say the first time you met Mr. Glenn was? A. In 1950 at Eklutna.

Q. And under what circumstances did you meet Mr. Glenn? A. Circumstances?

Q. Yes. In other words, I mean what took place when you first met him?

A. Mrs. and Mrs. Charlie Rosseau was there; they came there and——

Q. Excuse me, Miss Nickita, just where did they come?

A. They come from Palmer and Matanuska.

Q. And where did they go to? To your house?

A. No, at my aunt's house.

Q. And what took place after they arrived?

A. They came there and they got me. [16]

Q. Now, what do you mean by saying they got you?

A. I mean they took me back to Palmer.

Q. And now, did you want to go to Palmer?

A. No, I didn't.

Q. Did you say anything? A. No.

Q. Did you do anything?

A. They got me out of the bed and they told me to go in car with them.

Q. And whose home was this that this all took place in? A. Minnie's place.

(Testimony of Eva Nickita.)

Q. Minnie who? A. Minnie is my aunt.

Q. Your aunt. Now——

The Court: I think you better take that microphone and put it in your lap. You do not get close enough to it there. It may be too low now. (The microphone was put in the witness' lap.)

Q. (By Mr. Kirkland): Did you want to get in the car? A. No, I didn't.

Q. Did you say anything about it?

A. I said I didn't want to go.

Mr. Butcher: Your honor, I wish to interpose objections to leading questions; asking her if she wanted to get in the car is a leading question. Counsel's duty is to ask her [17] what she did and what was said, not to invite her to specify things by leading her and I object to it.

The Court: I think these are preliminary matters. Objection overruled.

Mr. Butcher: These are the very heart of the matter, that this girl was taken without consent. Did you go willingly is certainly the heart of the matter.

The Court: No charge that she was taken anywhere without consent.

Mr. Butcher: Well, then, the question is immaterial and irrelevant.

The Court: If it is preliminary, and I assume it is preliminary, why, it is not immaterial nor irrelevant. It cannot be objected to on that ground.

Mr. Kirkland: It is preliminary, your honor.

(Testimony of Eva Nickita.)

Q. (By Mr. Kirkland): Now, after you got in the car where did you go?

A. Back to Palmer.

Q. Now, who was in the car?

A. Who was in the car?

Q. Yes.

A. There was Gronia Rosseau and her husband and Minnie and Ted and I.

Q. And where did you go in the car?

A. Went back to Palmer. [18]

Q. And where did you go in Palmer?

A. Took the Rosseaus back to Matanuska and back to Ted's house.

Q. Who went to Ted's house?

A. Just me.

Q. And you are referring to the defendant in this case. Now, what took place when you arrived at the defendant's house?

A. Well, from—we just get in there and got in bed.

Q. How did this—is that the first thing you did when you went in the house? A. Yes.

Q. Did you want to?

Mr. Butcher: Now, your honor, I object to that as immaterial, irrelevant and it is not preliminary, nothing to do with the issues in this case.

The Court: Objection overruled.

Mr. Butcher: Exception.

Q. (By Mr. Kirkland): What did you say? What was your conversation with the defendant when you got in the house?

(Testimony of Eva Nickita.)

A. Well, I—what do you mean by conversation?

Q. What did you talk about? In other words, when you got out of the car and got there?

A. I started to cry. I said I didn't want to go.

Q. And what did the defendant do?

A. Well, he got in bed with me. [19]

Q. Well, and what happened when you got in bed?

A. Well, he started something bad.

Q. And now what do you mean by "something bad"?

A. Well, he started—I don't know what they call it—anyway but——

Q. Well, can you describe what the defendant did?

A. Yes, well he got on top of me to start something.

Q. And what did you say? That he got on top of you? A. Yes.

Q. Now, what did the defendant do when he wasn't—when he got off of top of you?

A. I don't know how to explain that.

Q. Well, what was the conversation? In other words, what did you talk about? What did he say to you? In other words, after he got off of you.

A. After he got off?

Q. Yes. A. He went to sleep.

Q. Well, now before he got off the top of you, to make this clearer did—Now, will you describe it? Just tell the court and jury what the defend-

(Testimony of Eva Nickita.)

ant did do. In other words, he was on top of you. Then what position did you get into?

A. Well——

Mr. Butcher: Your honor, I object to that question on the ground that it assumes something that has not been [20] testified to. She has been asked what he did and she has told that he got on top of her and that he went to sleep and counsel is saying: what other position he got into.

Mr. Kirkland: I think this witness would certainly—I would be allowed to ask leading questions of this witness now, which I have refrained from doing.

The Court: I do not remember now what the question was. You better ask it again or go on with the examination.

Q. (By Mr. Kirkland): Will you describe exactly what the defendant——

The Court: You use the word "describe". She may not know the meaning of "describe". You better use simpler language than that. Ask her to tell.

Q. (By Mr. Kirkland): Will you tell what the defendant did to you? A. Say again.

Q. Will you tell what the defendant did in the bedroom?

A. Well, he did something that—I don't know how to explain that.

Q. Will you tell just what happened.

A. Well, he got on top of me and——

Q. Did he do anything while he was on top of you? A. Yes.

(Testimony of Eva Nickita.)

Q. What did he do while he was on top of you?

A. Well, I'll say he did something that—— [21]

Q. Did he touch your privates?

Mr. Butcher: Now, your honor, I object to that question. This witness has not shown that she does not know what happened or that she is incapable of expressing herself. She is only showing her reluctance to tell about something that is embarrassing. That is no basis for counsel guiding her as he is doing.

The Court: You may ask leading questions. She is reluctant and that is enough.

Mr. Butcher: And I take exception.

Q. (By Mr. Kirkland): Did the defendant touch your personals, your privates? A. Yes.

Q. And what did he touch your privates with?

A. I don't understand what you mean.

Q. In other words, what did he touch your—I believe you referred to as a—personal? What did he touch your personal with? His hand?

A. No.

Q. His privates? A. No.

Mr. Shaw: If the court please, the witness has just indicated that she did not know the meaning of the word "privates". He is pressing her on that point.

The Court: I think the language is beyond her [22] comprehension.

Mr. Shaw: I wish to object to leading questions.

The Court: You apparently interviewed her before, why don't you use the same language?

(Testimony of Eva Nickita.)

Mr. Kirkland: I am, your honor. "Personal" was her own expression for the word.

Mr. Butcher: Maybe, your honor, counsel is afraid to use those words.

The Court: This is not a place to shrink from using plain language.

Q. (By Mr. Kirkland): Miss Nickita, did the defendant put his mouth on your privates?

A. Oh, yes.

Q. Between your legs? A. Yes.

Q. Now, tell what happened then?

A. Then he did that to me on the back.

Q. He did what? A. On the back.

Q. Now, what do you mean on back?

A. Well——

Mr. Shaw: If it please the court, I cannot hear the witness at this distance and I am wondering if the jury can hear the answers, especially this gentleman that is hard of hearing. It is impossible for me to catch the answers at this [23] distance.

The Court: Mrs. Brewington (the bailiff), will you extend this microphone for her to get it up higher. She apparently lets it drop. I think you will have to raise it, elevate it. Can it be tightened?

The Bailiff: It can but it is going take time, I guess.

The Court: I think the system is obsolete.

(The bailiff tried adjusting both microphones and there was some more discussion had about the system and what could be done.)

Q. (By Mr. Kirkland): Miss Nickita, where did

(Testimony of Eva Nickita.)

the defendant put his mouth? A. Put what?

Q. His mouth? A. Oh.

Q. Where?

A. Oh. (Long pause.) He put it on down there.

Q. What do you mean by down there?

A. He put it.

Q. Where you wee-wee? A. Yes.

Q. How long did he stay that way?

A. Well——

Q. How long? Five minutes, ten minutes, one minute? [24] A. No, about ten minutes.

Q. And what would he do with his mouth there? Did you feel his tongue? A. Yes.

Q. Did he hold his tongue still?

A. No, moved it around.

Q. Moved it around? A. Yes.

Q. Now, after that then what happened?

A. After what?

Q. After his mouth, then what happened after he put his mouth and tongue there, then what happened?

A. Well, after he did all those things he went to sleep.

Q. Now, wait a minute, what are all the things that took place? Now, you have told us of the mouth and about him getting on top of you, now was there anything else? A. Yes.

Q. And what was that?

A. He did that on the back of me.

Q. Now, what do you mean on the back?

A. I don't know what you call that.

(Testimony of Eva Nickita.)

Q. Did he put his thing somewhere in the back?

A. Yes.

Mr. Butcher: Now, your honor, I do not believe that is explicit enough. I do not know whether he is talking about [25] his tongue or something else.

The Court: It is true it is not explicit enough but he has not quite finished his examination yet.

Mr. Butcher: Well, I think that the word "thing" should be further defined so that we know—I know and the jury knows—the answer the witness has made.

The Court: It should be.

Mr. Kirkland: Now, by "thing" is that what he put in the front?

Mr. Butcher: Now, your honor, that question is so vague and ambiguous.

The Court: I do not think your questions are plain enough for a person of her intelligence.

Q. (By Mr. Kirkland): Did he put the thing he teed-teed with back there? A. Yes.

Q. And you know what he tees-tees with now, don't you?

Mr. Butcher: Now, your honor, I do not think that is at all clear. He called it "wee-wee" awhile ago.

Mr. Kirkland: I think counsel is dillydallying. I do not think any one in the courtroom or the jury or counsel himself knows what "it" means.

The Court: I do not think you should shirk from using plain language. You can use plain lan-

(Testimony of Eva Nickita.)

guage; the court has given you permission to ask leading questions of a specific [26] kind.

Q. (By Mr. Kirkland): Now, the thing that he put in the rear was that the thing that was between his legs hanging down?

The Court: She did not say rear; she may not know what that means. She used the term "back".

Q. (By Mr. Kirkland): Now, by "rear" what do you mean by that? Can you make that a little clearer?

A. I don't know what that means.

Mr. Butcher: As a matter of fact, your honor, she never used the word "rear".

The Court: No, I think she stuck to one term.

Mr. Kirkland: Your honor, I stick to one term and counsel wants me to change to other terms.

The Court: She used the word "back". Now, stick to that.

Q. (By Mr. Kirkland): What did you mean by "back"?

The Court: She does not have to explain what she means by "back". Everybody knows what that is. You will have to ask the question in a different form. If necessary have her stand up and point.

Q. (By Mr. Kirkland): Miss Nickita, will you please stand up. What do you mean by "back"? Will you point to what you mean by your "back"?

The Court: Turn around, turn your back to him.

Mr. Butcher: She may not mean—by "your back" your [27] honor is presuming she means something.

(Testimony of Eva Nickita.)

The Court: I cannot presume anything else but that she means "back" by back.

Mr. Butcher: Let her point it out.

The Court: Turn around and point it out. We have wasted enough time now.

Q. (By Mr. Kirkland): Will you point to what Mr. Glenn did on your back? Will you put your hand there?

A. I mean the side here.

Q. Will you turn around a little bit, right in there now. Did Mr. Glenn put anything in there?

A. Yes.

Q. And what did he put in there?

A. I don't know what they call that.

Q. But was it what he has between his legs?

A. Yes.

Q. What he tee-tees with? A. Yes.

Q. You can sit down now, Miss Nickita. How long did you remain at the Glenn—at the defendant's house?

A. About two weeks or three weeks.

Q. Where did you go when you left?

A. When I left I went back to Eklutna.

Mr. Shaw: If it please the court, I would like to request that she hold the microphone again. I am unable to hear. [28]

The Court: You better put the microphone in your lap with the book under it.

Q. (By Mr. Kirkland): Now, where did you go when you left the defendant's house?

A. Well, he took me back to Eklutna.

(Testimony of Eva Nickita.)

Q. And why did the defendant take you back?

A. Because I can't cook and I can't do the housekeeping so he took me back to Eklutna.

Q. Did you enjoy your stay at the Glenn residence, the defendant's house? Did you have a good time while you were there?

Mr. Butcher: I object to that question—nothing in the issues of this case.

The Court: Yes, objection sustained.

Mr. Kirkland: Your witness.

Cross Examination

By Mr. Butcher:

Q. Your name is Eva, is that correct? Eva Nickita? A. Yes.

Q. Eva, how old are you? A. 19.

Q. You are 19 years of age now. When did you learn you were 19 years of age? [29]

A. When did I learn it?

Q. Yes. Have you always known you were 19 years of age?

Mr. Kirkland: Your honor, I object to that as being immaterial.

The Court: Sustained.

Mr. Butcher: Your honor, I make an offer of proof. I can prove that this witness has previously told—not only told the district attorney but the grand jury that she was of another age and that she knew that other age all the time and that she did not tell the truth about it. Now, for the purpose of impeaching this witness' testimony——

(Testimony of Eva Nickita.)

Mr. Kirkland: I ask that counsel approach the bench or ask that the jury be excused.

The Court: The objection is sustained.

Mr. Butcher: For my own information, your honor, is the court ruling now that the fact that this witness told another story am I forbidden to bring it out?

The Court: It is immaterial.

Mr. Butcher: Even for the purpose of impeaching this witness?

The Court: I have ruled against it and that ought to be the end of it.

Mr. Butcher: Exception.

Q. (By Mr. Butcher): When you were living with your Aunt Minnie—her name is Minnie Nelson, is that not correct? [30] A. Yes.

Q. And she lives at Eklutna? A. Yes.

Q. In a cabin, is that correct? A. Yes.

Q. That a one-room cabin? A. Yes.

Q. A one-room cabin and Mr. Nelson—and that is her husband, Minnie's husband—and Minnie lived in this cabin and slept in the bed in the cabin?

A. Yes.

Q. And did you sleep in another bed in the same room? A. Yes.

Q. Now, you have testified that Mr. Glenn, whom you call Teddy, came to your house one night sometime in November. Do you recall that you testified to that? Eva, do you remember that?

A. I was staying with my Aunt's house.

Q. And Mr. Glenn and two other men came to

(Testimony of Eva Nickita.)

the house? Mr. Glenn and two other men came in an automobile one night to the house?

A. No.

Q. What is that?

A. Charlie and Gronia came.

Q. Do you recognize the name of Charlie Rosseau? [31] A. Yes.

Q. Was he with Mr. Glenn? A. Yes.

Q. And was Mr. Kurtz—was he the other man with Mr. Glenn? A. I don't know him.

Q. Do you recognize the name Cecil?

A. Yes, he lived at the farm.

Q. He lives on the farm and his name is Cecil, is that right? A. Yes.

Q. And he was with Teddy, is that correct?

A. I think it was; I didn't see him.

Q. When they got to the cabin they came in the room where——

Mr. Kirkland: Wait a minute, your honor, I object. The witness said she thinks he did. I think counsel should establish she saw this witness.

The Court: I cannot anticipate what he is going to ask next so I cannot rule on it.

Mr. Butcher: She testified Mr. Glenn came with two men, as good as I could hear. She has recognized Charlie Rosseau and I asked her if she knew Cecil. She said he owned a farm in Palmer. There were three men that came to the house, is that not correct, Eva?

A. Yes, but I didn't see the other man.

Q. Did he stay out in the car?

(Testimony of Eva Nickita.)

A. I don't know. [32]

Q. But you did see Charlie Rosseau?

A. Yes.

Q. And you saw Teddy? A. Yes.

Q. And did you see anybody else?

A. Gronia Rosseau.

Q. Well, now, did these three men come in the house?

A. I saw two men in the house.

Q. And did they talk to Minnie? Did the men talk to Minnie? A. Yes.

Q. And did Minnie say anything to you?

A. Told me to go with the men.

Q. Told you to go with the men? A. Yes.

Q. And did you have a suitcase?

A. No, it was—my suitcase was down at my sister's.

Q. Did you go down and get your suitcase?

A. No, I didn't get that until later.

Q. Well, later that same night or some other time? A. Some other time.

Q. Did you have some clothes and things that you put in the suitcase?

A. No, not many clothes.

Q. But you did have some? A. Yes. [33]

Mr. Kirkland: Your honor, I want to object to this as being immaterial. I cannot see where it has any relation and it is entirely irrelevant to the charges for which the defendant is standing trial.

The Court: Yes, it would seem immaterial.

Mr. Butcher: It is highly material, your honor.

(Testimony of Eva Nickita.)

Counsel asked the girl if she went willingly. She said the men told her to go. Now she says the Aunt told her to go. If the cross examination is permitted it is permitted on the subject matter she testified on. I am asking her the questions and we are finding out some new facts. Am I forbidden to find out the new facts by his honor's ruling?

The Court: If getting the clothes would throw any light on whether she went willingly or unwillingly, there isn't any question but that it would be proper. But it just does not appear to be material. If you promise to show the materiality, you may go on with it.

Q. (By Mr. Butcher): You had a suitcase with you at Mr. Glenn's house, did you, Eva? A. Yes.

Q. But you didn't take it that night. It is your recollection that you did not get it that night; that he came to your house the first time?

A. Yes.

Q. And you got it some other time, is that right?

A. No. I think I got it that night.

Q. You got it that night? When you got out of bed and got dressed did you go down to your sister's house before you went with the men?

A. My sister's?

Q. Yes, where your suitcase was.

A. Yes, I think.

Q. And you got your suitcase? A. Yes.

Q. And then you went and got in the car with three men? A. What do you mean?

Q. Two men, Teddy and Charlie Rosseau, and

(Testimony of Eva Nickita.)

the other man whom you call Bruno Rosseau, is that right? A. What you call him?

Q. What do you call him? What did you call the other man? Bruno Rosseau? A. Yes.

Q. Yes, and you got in the car with them?

A. Yes.

Q. Now, did you say that Minnie also got in the car?

A. Yes, Minnie went to Palmer because I didn't want to go so she went with me.

Q. Minnie went to go with you? A. Yes.

Q. And when you got to Palmer did she get out? [35] A. She got out and left me.

Q. At Mr. Glenn's house or in Palmer?

A. In Palmer.

Q. And where did Mr. Rosseau go?

A. To come back to Matanuska.

Q. He what? A. Matanuska.

Q. He went over to Matanuska. Did you go with him at that time? A. Yes.

Q. And then you went with Mr. Glenn, is that right? A. Yes.

Q. Now, when you got to Mr. Glenn's house didn't you play some phonograph records he had on a phonograph he had there?

A. Phonograph?

Q. Yes. A. No.

Q. A record player, a radio, did you play the radio? A. The radio was on a——

Q. When you went to his house that first night, Eva, did you play the radio?

(Testimony of Eva Nickita.)

Mr. Kirkland: Your honor, I object to that as being immaterial and irrelevant; whether they played the radio or not has no bearing on the charges.

The Court: Objection is overruled. [36]

Q. (By Mr. Butcher): Did you play the radio, Eva, after you got to Mr. Glenn's house?

A. No, I don't think I play it; I think I was crying.

Q. Well, were you still crying when you got to Mr. Glenn's house? A. Yes.

Q. Now, when you went inside of Mr. Glenn's house, did you go to bed?

A. I didn't want to go to bed.

Q. Well, why did you go to bed then?

A. Because he asked me to go to bed with him.

Q. And then you went to bed with him?

A. Yes.

Q. Who got in bed first, do you remember?

A. Well, he asked me to get in bed first.

Q. And did you take the clothes off before you got in bed? A. Yes.

Q. All of them?

A. Yes, he asked me to take all my clothes off and get in bed and so I did.

Q. And you got in bed and whose bed did you get in? A. Glenn's bed.

Q. That was a double bed; was that a double bed? A. It was a kinda big bed.

Q. Were there any other beds in the house? [37]

(Testimony of Eva Nickita.)

A. No, I don't see any other beds except the big bed.

Q. During the three weeks that you stayed there did you see any other beds? A. No.

Q. Never saw any other beds? A. No.

Q. How many rooms were in the house, do you remember? A. A big house anyway.

Q. And lots of rooms? A. Yes.

Q. How soon after you arrived at the house did you take your clothes off and go to bed? Was it right away or did you have some food or something else? A. No, I didn't even eat.

Q. You didn't have anything to eat? Had you had anything to drink that night?

A. I drank whiskey with him.

Q. Had you had some whiskey before he came out there?

A. Before he came out there?

Q. Yes, at Minnie's house?

A. No, I was in bed then.

Q. Had you had any whiskey before you went to bed? A. No.

Q. Now, on this night, this first night—do you understand what I mean by intercourse? [38]

A. No.

Q. Do you understand what I mean by—is there a word that you know, Eva, that you use which means when a man puts his penis in your privates? Do you know what that word is? A. No.

Q. You don't know. Now, on this first night that you were there with Mr. Glenn, did he ever put his

(Testimony of Eva Nickita.)

penis in between your legs in your privates? Did he do that? A. Yes.

Q. He did. Now, did he do that first?

A. When we got in bed he did that.

Q. You mean he did that when he got on top of you, is that right? A. Yes.

Q. And when he got off the top of you then did he go to sleep or did he do something else?

A. After what?

Q. What did he do after he got off the top of you, after putting his penis in your private parts, what did he do then?

A. Well, with his tongue on me.

Q. Did he go to sleep?

A. No, after I—he did all that.

Q. After he told all the things—you didn't tell about him putting his penis in there when you told it to Mr. Kirkland, did you? Did you just remember that he did that? [39]

A. Well, I thought you mean he put——

Q. Did he do that lots of times during the three weeks while you were there?

A. Every night, mostly.

Q. Every night he put his penis in your private parts?

A. No, no, on the private parts, on the back, too.

Q. Also in the private parts, is that right?

A. Yes.

Q. What would he do? When happened when you got up the next morning? Did he go off to work? A. Go off to work.

(Testimony of Eva Nickita.)

Q. Did you go to sleep that night, too, after these things? Did you go to sleep?

A. I was crying all night and finally I went to sleep.

Q. Did you finally go to sleep? A. Yes.

Q. And when you awakened the next morning was Mr. Glenn still there?

A. There—was out in the barn.

Q. And did you do any work around the house that day? A. No, I sat and cried.

Q. Did you finally quit crying?

A. No, I didn't, never stopped crying.

Q. Did you cry for three weeks?

A. Yes, I didn't even say a word to him. [40]

Q. Did you get any food while you were there?

A. I ate some.

Q. Did you cook him any meals?

A. No.

Q. You didn't try to cook for him?

A. No.

Q. Did you clean his house? A. No.

Q. Did you do any work there at all?

A. No.

Q. You just sat and cried? A. Yes.

Q. Did you ask him to take you back to Minnie's? A. I told him I would go home.

Q. And where was home? At Minnie's place?

A. No.

Q. Where was home?

A. I was staying with Minnie some nights and

(Testimony of Eva Nickita.)

sometime I stay with my other Aunt and sometimes I stay with my sister.

Q. Now, Eva, before you went with Mr. Glenn, before you went with Mr. Glenn to his house, had you ever been in bed with any other man?

Mr. Kirkland: Objection, your honor.

The Court: Sustained.

Mr. Butcher: I would like to make an offer of proof, [41] your honor, and support it with authorities that in a charge of sodomy great liberality in cross examination must be granted.

The Court: I have already ruled against it in your opening statement.

Mr. Butcher: What is that?

The Court: I have already ruled that evidence of that kind is not admissible on your opening statement.

Mr. Butcher: This is cross examination, your honor.

The Court: I know but the rule includes the whole case.

Mr. Butcher: Well, this is an important juncture in the trial, your honor, and we have the best authorities on the subject that in a charge of sodomy the previous chastity of the female——

The Court: I do not want to hear any argument of that kind, particularly in the presence of the jury. If you think you have authorities of the kind you intimate you may argue outside of the presence of the jury.

Mr. Butcher: Is your honor prepared to hear that argument now or wish it further on?

The Court: Whatever is the wish of counsel.

Mr. Butcher: I would like to proceed with proper cross examination and I am prepared to argue the matter now.

The Court: Very well; the jury may be—we will be in recess for ten minutes. The jury may retire to the jury [42] room. The jury room is up there (indicating). You may just dispose of yourselves as you would during an ordinary recess.

(Whereupon the jury left the jury box and retired to the jury room to await being called, and the following proceedings were then had, in the absence of the jury.)

The Court: You may proceed with the argument.

Mr. Butcher: If your honor please, Mr. Shaw is going to make the argument.

Mr. Shaw: If it please the court, I am going to cite one authority here, in order to save the time of the court—Redmon v. State, Supreme Court of Nebraska case, July 16, 1948, 33 N.W. Repts. 349, 350-352. The court here in this case quotes in great detail from Wigmore's Code of Evidence and I do not deem it necessary to read any more. I would like to read, your honor, this quotation from Wigmore first—quoting from Redmon v. State, Dean Wigmore says in regard to such evidence:

"There is, however, at least one situation in which chastity may have a direct connection with veracity, viz. when a woman or young girl testifies as complainant against a man charged with a sexual crime,

—rape, rape under age, seduction, assault. Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted, partly by inherent defects, partly by diseased derangements [43] and abnormal instincts, partly by bad social environment, partly by temporary psychological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents in which the narrator is the heroine or the victim."

In this case, Redmon v. State, one of the grounds advanced for reversal, and the case was reversed, your honor, was whether or not such evidence as this might be adduced on cross examination. The first citation of error was that the defendant as a ground for reversal is: "In prosecutions for sexual crimes for the purpose of reflecting on the credibility of the prosecutrix, she may be cross examined to show she is accustomed to having promiscuous sexual relations." And in this case, quoting Dean Wigmore, the Supreme Court of Nebraska held that it was reversible error not to permit such evidence as to the chastity of the prosecutrix to say nothing of the matter of impeachment. This is not on the subject of impeachment. It is the argument of counsel for the defendant. We have the right to ask this type of question on the matter of impeachment alone but certainly upon the matter

of the prosecutrix' chastity on such a charge as this, your honor is aware of [44] the difficult problem defendant is up against in a case of this kind, as pointed out.

The Court: I do not want to hear any more argument. If that is all the authority you have the court will give you its ruling. You can find one or two decisions on any way that you want to find them but that does not make it the weight of the authority. It is not the ruling in this jurisdiction.

Mr. Shaw: This is Dean Wigmore.

The Court: I know but Dean Wigmore is at variance with authorities' views and are not adopted by authorities in all cases and this court is bound by what it conceives to be the weight of authority and not by Wigmore.

Recess for five minutes.

(Whereupon at 4:25 o'clock p.m., September 23, 1953, court reconvenes, following a 15-minute recess, the jury having been recalled to the jury box, and the following proceedings were had.)

EVA NICKITA

resumes the witness stand and testifies as follows on

Cross Examination

By Mr. Butcher:

The Court: Mr. Myer, you may exchange seats with Mrs. Swanson. (The juror did so, being hard of hearing.)

You may proceed with the cross examination. [45]

Q. Eva, after you left Mr. Glenn's house did

(Testimony of Eva Nickita.)

you ever write him a letter, write Mr. Glenn a letter? A. Write a letter?

Q. Did you write a letter to Mr. Glenn?

Mr. Kirkland: Your honor, I object to that as being immaterial.

The Court: Objection overruled.

Q. (By Mr. Butcher): Do you understand what I mean by writing a letter? A. Yes.

Q. Did you write a letter to Mr. Glenn?

A. Yes.

Q. And in that letter did you ask him for some money? A. Yes.

Q. And did you tell him that if he didn't give you some money you would get him in trouble?

A. Get him in trouble?

Q. Yes. A. Yes.

Q. And did he send you any money?

A. No.

Q. Who is the first person you told this story to that you told in court this afternoon? Who did you tell it to? A. This afternoon?

Q. Yes, before you told it this afternoon did you tell it to [46] somebody else?

A. What about? The letter?

Q. No, what about you and Mr. Glenn did over at his house? A. This afternoon.

Q. Did you tell anyone at another time this story that you told in here this afternoon?

A. What?

Q. Did you ever tell anybody about what happened over to Mr. Glenn's house?

(Testimony of Eva Nickita.)

A. Yes, I told—you mean those two men?

Q. Did you ever talk to Mr. Meaney? I don't mean Mr. Kirkland. Did you talk to somebody out at Eklutna?

A. You mean this afternoon?

Q. No, right after this happened or some time before you came into court here.

A. I wasn't in Eklutna this afternoon.

Q. Did you ever talk to any one at all about this matter? Did you talk to Mr. Jenkins?

A. Yes.

Q. Where did you talk to him?

A. This afternoon.

Q. No, some other time? A. In Palmer.

Q. Over in Palmer. Is that where you were going to school? A. Yes. [47]

Q. You are in a home over there, are you not?

A. No, I am not in home any more.

Q. You were at the Lazy Mountain Home?

A. Yes, I was at the Lazy Mountain Home.

Q. Is that where Mr. Jenkins talked to you?

A. Down in Palmer.

Q. Whereabouts in Palmer?

A. In Dorothy Saxton's office.

Q. Is that the first time that Mr. Jenkins talked to you? A. Yes.

Mr. Butcher: May I ask the court, does the court still stand on his previous ruling that I may not inquire as to where she told her age on previous occasions?

The Court: Yes.

(Testimony of Eva Nickita.)

Mr. Butcher: Eva, if you remember—do you remember when you told Mr. Jenkins about this in Dorothy Saxton's office? Do you know when that was? A. It was in——

Q. That was last when? A. January.

Q. January, month? A. Yes.

Q. This last January or before that?

A. This last January.

Q. This last January. That is the first time you ever told it? [48] A. Yes.

Q. And how—what happened that caused you to tell it then, after waiting two years? What made you tell Mr. Jenkins at that time?

A. Well I——

Q. What is that? A. He asked me.

Q. Did he ask you if Mr. Glenn had done these bad things to you? A. Yes.

Q. Did Mr. Jenkins ask you if Mr. Glenn did something to your back?

A. Yes, he asked me about it and I told him. I told him about it.

Q. And did he, Mr. Jenkins, ask you if he put his mouth on your privates? Did Mr. Jenkins ask you that?

A. No, I said that he did put his mouth.

Q. You told Mr. Jenkins that that is what he did, is that right? A. Yes.

Q. Now, had you talked to anyone before Mr. Jenkins about this? A. Before Mr. Jenkins?

Q. Other than Mr. Jenkins?

A. After? [49]

(Testimony of Eva Nickita.)

Q. No, before? A. No.

Q. No one but Mr. Jenkins and did he come and get you and take you to Miss Saxton's office, Dorothy Saxton's office to ask you these questions?

A. No, the highway patrolman.

Q. Came and got you? A. Yes.

Mr. Butcher: That is all, your honor.

Redirect Examination

By Mr. Kirkland:

Q. Now, Miss Nickita, you stated that you wrote a letter to the defendant, Mr. Glenn, asking for money, is that correct? A. Yes.

Q. Now, how much money did you ask Mr. Glenn for? A. How much money?

Q. Yes. A. How much money I asked?

Q. No, how much did you ask Mr. Glenn to send you? A. $10.00.

Q. And when did you write this letter and ask for this $10.00?

A. I don't remember when I wrote it. [50]

Q. Was it recently or quite sometime ago?

A. Quite sometime ago.

Q. Now, did Mr. Jenkins ask you to tell what happened to you or did he first—did Mr. Jenkins ask you to tell him what happened to you?

A. He asked me what happened and I told him what happened.

Q. Then did you tell him what happened?

A. No, he asked me.

Q. And then you told him what happened?

(Testimony of Eva Nickita.)

A. Yes.

Q. Now, on your cross examination, when this gentleman was asking you questions, you stated that you had a drink of whiskey on the evening you went to the defendant's house. Now, how did you happen to have that drink of whiskey?

A. The whiskey?

Q. Yes. A. Well, I didn't want it.

Q. Well, where did you get the whiskey?

A. Ted had it.

Q. Did you want to drink it?

A. I didn't want to drink it.

Q. Well, why did you drink it?

A. Because he kept on asking me to drink it.

Q. Did he touch you at any time?

A. Touch? [51]

Q. Yes, did he make you drink it, in other words?

Mr. Butcher: Now, your honor, that is going too far, even with the liberality of the court's ruling, that is going too far in fairness to this defendant. This is cross examination, not direct, and it shouldn't be leading here.

The Court: I think it is permissible in view of the reluctance of the witness. Objection overruled.

Mr. Butcher: Exception.

Q. (By Mr. Kirkland): Did anyone ever hit you, slap you?

Mr. Butcher: Further objected to on the grounds that it is irrelevant, immaterial and incompetent, your honor, whether he forced her to drink or

(Testimony of Eva Nickita.)

whether he hit her or slapped her has nothing to do with the issues of this case.

The Court: You better make that more specific as to who slapped her.

Q. (By Mr. Kirkland): Did the defendant slap you on the first evening that you went to his home?

A. Yes.

Q. Now, tell us about that?

Mr. Butcher: Your honor, this is not proper redirect examination. Any allegation or accusation of this kind should have been testified to on the direct examination. It is not a proper subject for redirect examination, which is to touch only upon those subjects brought out on cross examination or any new material. [52]

The Court: That may be true but you brought out something about these relations so the objection is overruled.

Q. (By Mr. Kirkland): Now, will you tell us about that, Miss Nickita? A. About what?

Q. Did the defendant, Mr. Glenn, ever slap you?

A. Yes.

Q. Now, will you tell us about it? When?

A. When we got in bed slapped me.

Q. Why did he slap you?

A. Because I didn't want to go to bed with him.

Mr. Kirkland: That is all.

Mr. Butcher: I ask that all that testimony be stricken on the grounds that it is not proper redirect examination, your honor.

The Court: Motion denied. Call your next witness.

(The witness was thereupon excused and left the stand.)

Mr. Kirkland: If the bailiff please, the next witness is in the custody of the marshal in my office.

DAVID C. GLASSCOCK

called as a witness on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland: [53]

Q. Will you state your name, please, sir?

A. David C. Glasscock.

Q. You want to pull the microphone closer to you. Where are you presently residing, Mr. Glasscock?

A. McNeil Penitentiary, Stillacoom, Washington.

Q. Mr. Glasscock, were you incarcerated at the Federal jail here in Anchorage? A. I was.

Q. Did you have occasion to become acquainted with the defendant in this case? A. I did.

Q. And did you have any conversations with that defendant? A. Yes.

Q. And is that the man sitting at the end of the table over there? A. That is.

Q. Now, Mr. Glasscock, I am going to ask you some embarrassing questions. I want you to repeat the answers exactly and in the exact words that were given. Did you ever have any conversation

(Testimony of David C. Glasscock.)

with the defendant about the charges upon which he is being held? A. Yes, sir.

Q. And what statements did he make with reference to those charges?

A. Well, one time he made the statement that he would probably [54] plead guilty to the rape and sodomy charge but that he would fight the murder charge.

Q. Now, how did you happen to——

Mr. Butcher: Your honor, I object to that question. The only charge that is involved here is the charge in the indictment. Now, this witness has brought out charges other than is before the court but which are not part of the issues of this case and I ask that that part of his answer be stricken.

The Court: The reference to murder is stricken. The jury is ordered to disregard it.

Q. (By Mr. Kirkland): How did you happen to have this conversation with the defendant?

A. Well, he came in the Federal jail rather late in the afternoon. As you know, there are approximately 20 to 26 bunks in there and the newest one in there was delegated to sit up late at night and Mr. Glenn sat up quite late of night and the first night he asked me if I had enough cigarettes and I told him I did and thanked him. He started talking about his case. Well, he talked about these sexual relations he had had with this 14-year-old girl, as he said, and said that he had—it is hard to put into words—that he had had intercourse with her both front and the rear and that he had gone

(Testimony of David C. Glasscock.)

down on her but the going down on her was the best of the works and he asked if it made me hot and propositioned me to go down on him [55] and I told him "no, I wouldn't." He always propositioned me.

Mr. Butcher: Your honor, this is going beyond the issues of the case again and the testimony he is attempting to elicit from the witness is incompetent and irrelevant.

The Court: The latter part of the answer is irrelevant.

Mr. Butcher: I think this witness should be instructed to answer the questions that are asked of him and to refrain from volunteering information that has nothing to do with the case. The United States Attorney should merely elicit what is relevant to the case.

Mr. Kirkland: Has his honor ruled that the sexual attempts with this defendant is immaterial as evidence in this case?

The Court: Yes, at this stage of the trial the evidence of other offenses is not admissible except within the compass of the rule and there has been no development yet that would call for the admission of such testimony. It might be after—at a later stage of the trial but not now.

Mr. Kirkland: Your honor, could I cite some authority in behalf of that proposition where there is a case of this nature?

The Court: Well, the jury is excused. We will

(Testimony of David C. Glasscock.)

be in recess as far as the jury is concerned for five minutes.

(Thereupon the jury was excused and left the courtroom [56] and the following proceedings were had.)

Mr. Kirkland: Your honor, in the case of People v. Molineux (Court of Appeals of New York. Oct. 15, 1901.), 61 N.E. 286, and in this case——

The Court: Now tell me what the charge was.

Mr. Kirkland: Your honor, the charge in that case was murder and the prosecution wanted to bring in evidence—it was murder by poisoning—of a similar crime. The court held that that was not admissible but they went on to a lengthy dissertation on that matter and the court held that:

"1. On a criminal trial the state cannot prove any crime against the defendant which was not alleged in the indictment as a foundation for a separate punishment, and as aiding the proof that he was guilty of the crime charged, unless such other crime tends to prove motive, intent, the absence of mistake or accident, the identity of the person charged with the commission of the crime or a common scheme——" [57]

The Court: That is just the rule to which I referred but under which of those do you contend this is admissible now?

Mr. Kirkland: A common scheme to show propensity.

The Court: To show what?

Mr. Kirkland: Propensity.

(Testimony of David C. Glasscock.)

The Court: Do you have any authorities on sodomy, for instance?

Mr. Kirkland: No, your honor, I don't, not on the particular crime of sodomy.

The Court: In other words, you offer this for the purpose of proving disposition?

Mr. Kirkland: Yes, your honor. To go further I would say a sexual attempt of the type such as the witness just testified to and what the defendant is charged with are so closely related in nature.

The Court: Well, I am in doubt whether it is admissible but it is near quitting time. Perhaps we should adjourn, unless you have other matters to inquire into with this witness, or are you about through with him?

Mr. Kirkland: I have a few more matters; I would like to go on with witness, your honor.

Mr. Shaw: If it please the court, before the court rules on that I would like to say one thing, to point out again that the character of the defendant is being attacked when his character has not been put into evidence, at least as yet, and [58] secondly, that this alleged conversation, which the witness was about to testify to there, took place subsequent to the time that the crime is charged.

The Court: That would not make the slightest difference. It could have taken place five minutes before he took the witness stand so far as showing admissions or anything that might be the foundation for impeachment.

Mr. Butcher: Your honor, what Mr. Shaw means

(Testimony of David C. Glasscock.)

is the acts that he spoke of—that he wanted him to go down on him and he wanted him to do other things—as tending to show his disposition to do it all took place after the crime alleged in the indictment and not before.

The Court: I do not think that would be what you would call important because disposition would presumably be the same at one time as at another time. The court will be in recess for an additional five minutes to examine the authorities on the proposition.

(After a short recess court re-convenes and the following proceedings were had:)

(The jury resumed their seats in the jury box at this time also.)

The Court: The weight of authority appears to be that evidence of other offenses with other persons is not admissible. The objection is sustained.

Q. (By Mr. Kirkland): Mr. Glasscock, referring to the [59] conversation you had with this defendant and you stated what this defendant had said to you pertaining to the sexual charges?

A. Yes.

Q. Were those the defendant's exact words?

A. Not his exact words, no, sir.

Q. Would you repeat the defendant's exact words?

A. To the best of my recollection the words were that "I fucked her and I went into the rearway but going down on her was the best part of it all."

Mr. Kirkland: Your witness.

(Testimony of David C. Glasscock.)

Mr. Butcher: Your honor, in view of the time I would just as soon postpone my cross examination of this witness until tomorrow morning.

The Court: Well, I think that since the court is so pressed for time that we ought to conclude with this witness tonight.

Cross Examination

By Mr. Butcher:

Q. Mr. Glasscock, what are you serving time in McNeil Island for?

A. Interstate transportation of securities or goods that could [60] be used in counterfeiting, and forgery.

Q. Have you ever served in any mental institution? A. No, sir.

Q. Have you ever been declared insane?

A. No, sir.

Q. By any court or jury? A. No, sir.

Q. Are you up here being examined now by the psychiatrist? A. No, sir.

Q. Have you made a plea to the district attorney's office or to the court to be transferred from McNeil Island for reasons of insanity?

A. I have not for reasons of insanity, no, sir. I made a plea to be transferred because of physical health. The plea has been granted by the Director of the Bureau of Prisons.

Q. And is mentality involved, too?

A. No, sir.

Q. Do you have a copy——

(Testimony of David C. Glasscock.)

Mr. Kirkland: I object to this. I do not have any control over a person down there so it has to be immaterial.

The Court: Well, it seems to me that the examination has all but exhausted this particular subject, has it not?

Mr. Butcher: Yes, your honor.

Q. Mr. Glasscock, have you had any conversation with the district attorney's office about the fact that if you testify [61] in this case that you will be relieved from further prison service?

A. No, sir.

Q. What are you doing up here at this time?

A. I was brought up on a writ of habeas corpus to testify in this case.

Q. What was that?

A. I was brought up on a writ of habeas corpus to testify in this case.

Q. And otherwise you are to return to McNeil Island? A. Yes, sir.

Q. You do have this application in for transfer to an institution? A. Yes, sir.

Q. And what is that institution?

A. Petersburg, Virginia, sir.

Q. And what kind of an institution is it, if you know?

The Court: Well, I think that is going too far.

Mr. Butcher: Well, if it were a mental institution, your honor, we should know it and the jury should know it.

(Testimony of David C. Glasscock.)

The Court: If he knows—he has already explained fully.

Mr. Butcher: It just requires that we come into court with another witness to show what kind of an institution it is. If this witness knows, I think he should answer. [62]

The Court: Objection sustained. Rather, it is going too far.

Q. (By Mr. Butcher): Mr. Glasscock, prior to your conviction and sentence to McNeil Island had you served time in any other prison?

A. No, sir.

Q. In any reform school? A. No, sir.

Q. Had you served time in any institution of any kind? A. No, sir.

Q. This was your first offense?

A. Yes, sir.

Q. Had you ever forged checks in any other place? You do not want to answer that question?

Mr. Kirkland: Your honor, I object to that question.

The Court: Objection sustained. No question of that kind is permissible.

Mr. Butcher: Withdraw the question. That is all.

The Court: Any redirect?

Mr. Kirkland: No, sir.

The Court: Ladies and gentlemen of the jury, we are about to adjourn. The case will be resumed at 10:00 o'clock tomorrow morning. In the meantime you are admonished not to talk about the case with anybody, either among yourselves or with any

other person, nor to allow anybody to talk with you [63] about it and if any one should attempt to talk to you about the case, you should warn him that you are on the trial jury. If he persists you should report the matter immediately to the court or to the United States Attorney. You are also not to come to any conclusion concerning the case until after it is submitted to you. You may adjourn court to 9:00 o'clock a.m.

(Thereupon, at 5:10 o'clock p.m., September 23, 1953, court was adjourned to the next morning, this case to be resumed at 10:00 o'clock a.m., September 24, 1953.) [64]

Court is convened at 10:00 o'clock a.m., September 24, 1953, at the request of the court the Deputy Clerk calls the roll of the trial jury, and each answers present to his or her name, whereupon the following proceedings were had:

Mr. Kirkland: I would like to call Jack Jenkins to the witness stand.

JACK JENKINS

called as a witness on behalf of the plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Mr. Butcher: If it please the court, before this witness testifies—with reference to the last witness who testified, Mr. Glasscock—this witness testified in the presence of the jury of certain charges which are not before this court. The court is familiar with,

(Testimony of Jack Jenkins.)

we believe, that that statement which the witness made was so prejudicial that it is impossible for the defendant to have a fair trial and for that reason we move the court that the court declare a mistrial.

The Court: Motion denied. The jury is instructed, if I have not already instructed the jury, that reference to any other crimes other than the one on trial insofar as the reference to the defendant should be disregarded by the jury and you [66] should not allow yourselves to be influenced by any such reference.

Mr. Kirkland: If it please the court, before I proceed with this witness I believe there are some minors in the [66-A] courtroom and the court made a ruling that no juveniles would be allowed in the courtoom.

The Court: All persons under 21 years of age are excluded—do you expect testimony of the kind elicited from the previous witness?

Mr. Kirkland: No, sir, I do not expect testimony of that type.

The Court: No reason for excluding.

Mr. Kirkland: All right.

Q. (Mr. Kirkland): Will you state your name, please? A. Jack Jenkins.

Q. What is your occupation?

A. Criminal Investigator for Alaska Native Service.

Q. How long have you been a criminal investigator for the Alaska Native Service?

A. Five years.

(Testimony of Jack Jenkins.)

Q. Then during the year of 1950 you were a criminal investigator for the Alaska Native Service? A. Yes.

Q. Mr. Jenkins, will you tell the court and jury how you happened to interview Miss Eva Nickita, who is the complaining witness in this case.

Mr. Butcher: Your honor, I object to that question on the grounds how he happened to interview Eva Nickita has nothing to do with the charge that is before this court. If he [67] knows anything about the crime, then he can testify about it.

Mr. Kirkland: If the court please, counsel for the defense on the cross examination and also in his opening statement tries to bring forth a malicious motive or an intent and also in cross examination of Miss Nickita brought forth how Mr. Jenkins obtained the statement and so forth and what the conversation was.

The Court: Well, but while it might become proper to put in evidence of this kind, if matters of that kind are brought out in defense it is wholly without foundation at the present time and the objection is sustained.

Mr. Kirkland: Then I have no questions of the witness, your honor. That is all.

(Thereupon, the witness was excused and retired from the witness stand.)

Mr. Kirkland: The Government will rest, your honor.

The Court: You may proceed with the defense.

Mr. Butcher: We have a motion, your honor,

which I think should be presented to the court in the absence of the jury.

The Court: The jury is excused until called.

(Whereupon, the jury leaves the courtroom to await being called and the following proceedings were had in the absence of the jury.)

Mr. Butcher: Your honor, in connection with Count No. III, Count No. II having been dismissed and evidence having been produced in connection with Count No. II and with reference to Count No. III we submit, your honor, that the essentials of the act of sodomy, as alleged in Count No. III, that is, that Theodore Roosevelt Glenn did commit sodomy with a female, to-wit: Eva Nickita; That the said Theodore Roosevelt Glenn then and there did insert his penis in the anus of Eva Nickita and did then and there agitate his penis in the said anus of said Eva Nickita, has not been proved in this court by the slightest evidence. The only evidence before this court, your honor, is that the complaining witness testified that he did a bad thing and the district attorney, in his efforts to solicit from the witness what in fact did happen—of course he was permitted to ask leading questions but among those leading questions—and considering all of those leading questions—there was not one time when the question was put to her or did she respond to such a question, did she state that he put his penis in her anus, which is the essence of the crime of sodomy alleged in this count. All she did was point to her buttocks and said after he had been on top of her and after he put his mouth on her

privates he put it on her back and after considerable effort here, she finally turned half around and touched her buttocks and that is the sole testimony, your honor, as your honor will recall that is submitted. [69]

Now, that is not sufficient to prove the crime of sodomy. I will submit that there has been enough evidence here to go to the jury on the question of the placing of the mouth upon the private parts of Eva Nickita and there is evidence to go to the jury on that but on the sodomy Count No. III there has not been sufficient evidence and I move that that count be removed from any consideration by the jury, that the jury, if necessary, be directed to find a verdict of not guilty on that particular matter.

The Court: Call the jury. Motion denied.

(Whereupon, the bailiff recalls the jury and the jury returns to the courtroom.)

Mr. Shaw: Call Mrs. Bryant. I think she is in the courtroom.

MRS. DALE BRYANT

called as a witness on behalf of the defendant, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Shaw:

Q. Will you state your full name to the jury, please?

A. Mrs. Dale Bryant—Charlotte Kruger Bryant.

Q. And where do you live, Mrs. Bryant? [70]

A. I am at the Lazy Mountain Children's Home in Palmer.

(Testimony of Mrs. Dale Bryant.)

Q. At or near Palmer?

A. Five miles from the town of Palmer.

Q. Are you the Secretary of that institution?

A. Yes, I am Secretary and Treasurer.

Q. You have charge of the books and records and the list of the people you keep out there?

A. Yes, sir, I do.

Q. Did you bring some records to court with you this morning? A. Yes, I did.

Q. Were you acquainted with Eva Nickita?

A. Yes, I am.

Q. Is she a member of the group that lived out at the home?

A. She is working in town at a private home just now but she did live in our home a couple of years.

Q. Were you in the Lazy Mountain Home until 1950?

A. No, I was in the States in 1950; I didn't return until 1951.

Q. Were you at the home when Eva Nickita first came there?

A. She came just one week—when I was down in Valdez—it was in the middle of May. We had come back in the beginning of May and had gone down to Valdez for some belongings and when we came back Eva had come.

Q. The personal record you have brought into court, Mrs. Bryant, does it show there the birth date of Eva Nickita? [71]

Mr. Kirkland: Objection, your honor.

(Testimony of Mrs. Dale Bryant.)

The Court: Objection sustained.

Mr. Shaw: If it please the court, I would like to make an offer of proof.

The Court: It is not a matter of offer of proof; it is a matter of relevancy. I do not see how it can be relevant here now.

Mr. Shaw: This goes to the credibility of the witness. The purpose of this offer here is to impeach the testimony of the witness.

The Court: That would be on an immaterial matter. Objection sustained.

Mr. Shaw: Exception, your honor.

Mr. Shaw: That will be all, Mrs. Bryant.

Mr. Butcher: I would like to show it is material, your honor. It is immaterial before he hears the offer of proof; wouldn't it be better to hear the offer?

The Court: The age of the alleged victim here is absolutely immaterial for any purpose. That is the ruling of the court and I do not want to hear any argument on it—for lack of time, if nothing else.

Mr. Butcher: May I ask the court a question? If the witness takes the stand and testifies to a certain fact, presuming it is her age, and it turns out it is not true?

The Court: I just got through ruling on the ground [72] it is immaterial and so you cannot contradict a person on an immaterial matter.

Mr. Shaw: Call Mrs. Nelson.

MRS. MINNIE NELSON

called as a witness on behalf of the defendant, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Shaw:

Q. What is your full name?

A. Minnie Nelson.

Q. Where do you live, Minnie?

A. Eklutna.

Q. How long have you lived there?

A. I have been there seven years.

Q. How long have you lived in Alaska?

A. All my life.

Q. How old are you? A. 55.

Q. Were you living at Eklutna in 1950?

A. Yes.

Q. Are you married? A. Yes.

Q. Were you living there with your husband at that time?

A. Yes, I was living in Eklutna with my husband. [73]

Q. Are you acquainted with Eva Nickita, the complaining witness in this case? A. Yes.

Q. Are you related to her? A. Yes.

Q. What is the relationship?

A. Well, her mother is third cousin or second cousin to me; I don't know.

Q. That would make you a cousin of some kind, would it not? A. Makes us relations.

Q. Did Eva Nickita stay at your home any time during the year 1950? Did she live there?

(Testimony of Mrs. Minnie Nelson.)

A. Yes.

Q. Do you remember what month she lived there with you? A. No, I don't remember.

Q. Would it have been in the summer or——

A. Winter.

Q. In the winter? A. Yes.

Q. Did Eva Nickita live at any other place in Eklutna besides your home?

A. Yes. Stayed with her sisters and her aunties.

Q. She stayed various places with others, too?

A. Yes.

Q. And now, I call your special attention to the month of [74] November of 1950? Are you having trouble hearing me? I will move a little closer. In November, 1950, do you remember if Eva was staying at your place?

A. Yes, she stayed at my place.

Q. Did she have a job? Did she work?

A. No.

Q. Do you remember when Eva left your place? When she no longer stayed there? Do you remember that, if it happened?

A. She left. She was going to stay with her sister and she left me.

Q. Well, do you remember in the month of November, 1950? You have testified that Eva stayed with you sometime in 1950 and the question is: During the fall of 1950 do you remember Eva being there and remember her leaving?

A. Yes, she stayed with me and then she left.

(Testimony of Mrs. Minnie Nelson.)

Q. Do you remember who she left with when she left?

A. Well, Charlie Rosseau and his wife and Ted.

Q. Who? A. Ted.

Q. Who is Ted?

A. I don't know. That is what they call him—Glenn.

Q. Ted Glenn?

A. And I don't know who the other guy is.

Q. Another fellow?

A. Old man. I forgot his name and they come up there and took [75] her away from there.

Q. Was this in daytime or night time?

A. Night time—around 10:00 o'clock. We was already in the bed already. Charlie Rosseau was the one that brought them up there.

Q. Will you tell us what was said when they came?

A. Yes, he said he want to take Eva with them.

Q. Who said this? Mr. Glenn?

A. Charlie Rosseau and his wife and Glenn was there and they was talking there and I was mad because I don't want nobody around there so he said, get wife. You willing to go? She said, yes.

Q. They asked Eva to go?

A. I said, I asked her if you willing to go and she said, yes.

Q. What did you ask her to go for?

A. I asked her is she was willing to go with Ted and she said yes.

Q. What was she going for?

(Testimony of Mrs. Minnie Nelson.)

A. I don't know—for a husband, that is all.

Q. Was anything said about her being a housekeeper? A. Well, he said——

Mr. Kirkland: Objection. That is leading too far.

A. Then he told her he said——

The Court: Just calling her attention to something [76] about which there might have been conversation.

Mr. Kirkland: The first question, which was asked before, was the purpose of her going there and the witness has testified and answered that question.

The Court: First you should ask her if she has related everything that was said there and if she recalls anything else. If she is unable to recall something else, you might call attention to it but otherwise you should not suggest it to her until you have exhausted the other means.

Mr. Shaw: Would you pull the microphone a little closer to you there?

A. Huh?

Mr. Shaw: May I approach the witness?

The Court: Speak louder. If you cannot speak louder you will have to get your mouth closer to that microphone.

(The witness gave a big sigh at this point.)

Q. (By Mr. Shaw): Did you talk to Eva this night about going to these people?

A. Well, she was willing to go with them; she was willing to go so they left.

(Testimony of Mrs. Minnie Nelson.)

Q. You say she was willing to go with them?

A. She was willing to go with them.

Q. To be Mr. Glenn's woman? A. Yes.

Q. Did Mr. Glenn ask her to go or did someone else? [77]

A. No, Charlie's wife. I mean Charlie's wife and Charlie, them was the one.

Q. Do you remember whether or not Mr. Glenn talked to Eva that night about it?

A. No, I didn't; just met them, that is all I notice about it.

Q. Did Eva—you said you were all in bed—did she have to get up and dress?

A. Well, she had no clothes on, just got up and go.

Q. Did she have any suitcases or anything?

A. Nothing. She didn't have nothing.

Q. She went with them?

A. She went with them.

Q. Did she go—did she make any protest against going? Did she say she didn't want to go?

A. No, she didn't even say that; she willing to go and she was gone. I don't know for how long and then she came back.

Q. How long was she gone?

A. I don't know how long she was gone; I didn't pay no attention.

Mr. Kirkland: I interpose an objection.

The Court: What grounds?

Mr. Kirkland: Irrelevant and immaterial. Part

(Testimony of Mrs. Minnie Nelson.)

of it I thought was going to become material or I would have objected earlier.

The Court: What was the question? [78]

Mr. Shaw: The previous question was: if she went willingly.

The Court: What was the question to which the objection was made?

Mr. Shaw: Slipped my mind—the question was: How long did Eva stay before coming back? How long was she gone?

The Court: Objection overruled.

Q. (By Mr. Shaw): Will you answer the question? Do you know how long Eva was gone?

A. No, I don't know; I don't remember how long she was gone.

Q. Was it a day or a week or a month?

A. I don't know.

Q. Don't know. Do you remember when Eva came back?

A. Yes, she come back and she was very unhappy. Had a ring on and she says he is a good man and he said I couldn't cook or do anything. I said that is your fault. If you want him that is up to you. I got nothing to do with it. She called me Auntie. That is all I told her.

Q. Did she say why she came back?

A. Well, she said Ted was going outside, his mother was dying and he went outside and she have to stay with sister and after he comes back he would get her and he didn't never come around to my place.

(Testimony of Mrs. Minnie Nelson.)

Q. She was going to stay at your place again?

A. No, I don't want her there because her sister look after [79] her.

Mr. Shaw: If the court please, I would like to make an inquiry at this time. If your honor's ruling yesterday upon a case of cross examination concerning the reputation and chastity of the prosecutrix——

The Court: I do not want that re-opened any more. I have already ruled on that.

Mr. Shaw: Does the same ruling apply on direct examination?

The Court: On direct examination.

Mr. Shaw: Well that was cross examination when your honor made the ruling. I am asking——

The Court: If it is immaterial then it is immaterial now, whether it is direct or cross examination.

Mr. Kirkland: Your honor, I feel as though counsel should be remonstrated for even asking an opening statement. It was decided and it is casting an unfair inference to this jury.

The Court: The jury is instructed to disregard also all references to chastity.

Mr. Shaw: No further questions.

Cross Examination [80]

By Mr. Kirkland:

Q. Mrs. Nelson, who did you say came in your house that evening you were testifying about?

A. What?

(Testimony of Mrs. Minnie Nelson.)

Q. Who all came to your house the evening that Eva left?

A. Charlie Rosseau and his wife and Ted and other guy. I don't know what his name is.

Q. And where is Charlie now?

A. I don't know; he is in jail, isn't he?

Q. In where?

A. He is in jail, isn't he? I don't know.

Q. Well, where is Mrs. Rosseau?

Mr. Shaw: I object, your honor.

A. She is dead.

Mr. Shaw: That is irrelevant and immaterial.

A. She died.

The Court: Objection overruled.

Q. (By Mr. Kirkland): Did you have anything to drink that evening? A. No.

Q. Did they bring you anything to drink?

A. No.

Q. Did you go with them that evening when they left?

A. I went with them; I went as far as Palmer and I come right back. Didn't have no drink with them. [81]

Q. Have you been convicted of a crime?

A. I don't understand.

Q. Have you ever been——

The Court: You will have to ask in language she understands. Ask her if fined or put in jail.

A. Yes.

Mr. Shaw: I object, your honor. I object, your

(Testimony of Mrs. Minnie Nelson.)

honor, to that question. It is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. (By Mr. Kirkland): Have you ever been put in jail? A. Yes.

Mr. Butcher: I object on the grounds the witness may be asked if she has ever been convicted of a crime, not if she has been arrested.

The Court: If she does not understand the word "crime", you should form the question: If she was ever fined or put in jail after being found guilty.

Q. (By Mr. Kirkland): Have you ever been fined or put in jail after being found guilty?

A. Yes, I was in jail and fined.

Q. Were you fined? In other words, did you pay the judge some money?

A. Yes—30 days.

Mr. Kirkland: I rephrase that question, also, your [82] honor.

Q. Did you pay the court some money? Did you pay any one any money as a result of being found guilty? A. I paid it to the judge.

Q. Now, how many times have you been found guilty of a crime?

A. I don't know; I can't answer that.

Mr. Butcher: The question is very clear in our statute that he may ask if she has been convicted of a crime and if she answers "yes" he drops the matter. Now, he is going on to find out how many times she has been arrested.

The Court: Not going into arrest and he has

(Testimony of Mrs. Minnie Nelson.)

the right to ask how many times convicted and for what. That has been the ruling of the court for years.

Q. (By Mr. Kirkland): How many times have you had to pay a fine and be in jail after being found guilty?

A. I can't remember all those things; I know I have been in jail lots of times. I don't know how many times.

Q. Lots of times? A. Yes.

Q. What for? A. Drunkenness.

Q. Did you discuss your testimony with the two attorneys in this case as to what you were going to say on the witness stand?

A. I can't understand all those things. [83]

Q. Did you talk about what you were going to say on the witness stand with Mr. Shaw——

The Court: She does not understand obviously.

A. I remember all the times. I am telling you the truth.

Q. What I am talking about—did you talk to Mr. Butcher and Mr. Shaw, the two gentlemen sitting over there, as to what you would say today where you are right now? A. No, no.

Q. Didn't ever discuss it?

A. Never discussed it with the attorneys.

Q. Never discussed it with them?

A. No.

Q. You are positive? That is all.

Mr. Kirkland: Your witness.

Mr. Shaw: No further questions. That is all.

(Thereupon, the witness was excused and retired from the witness stand.)

Mr. Shaw: Call Mr. Glenn.

THEODORE ROOSEVELT GLENN

called as a witness on behalf of the defendant, being the defendant, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Shaw:

Q. Will you state your full name? [84]

A. Theodore Roosevelt Glenn.

Q. And where do you live? Where did you live?

A. I lived at Palmer, about three miles out of Palmer.

Q. How long have you been in Alaska, Mr. Glenn?

A. Since 1939, come up here December 8, 1939, landed in Anchorage.

Q. And when did you move to Palmer?

A. In 1945, fall of 1945.

Q. What is your business and occupation? What was it in Alaska up there at Palmer?

A. I have been a carpenter by trade.

Q. Did you do anything else?

A. I was helping on the farm, yes; we was in the greenhouse business and I owned a farm.

Q. You owned a farm?

A. Yes, I owned a farm.

Q. Did you have a family when you moved to Palmer?

A. Yes, we had two adopted children that is part

(Testimony of Theodore Roosevelt Glenn.)

native and we had adopted them right here in Anchorage.

Q. What was your wife's name then?

A. My wife's name is Barbara Juanita Glenn.

Q. Are you living with her now?

A. No, I am not. We separated in 1950.

Q. Was that a divorce action? A. 1950——

Mr. Kirkland: Your honor, I object.

The Court: Objection sustained.

Q. (By Mr. Shaw): Calling your attention to all of 1950 were you living at Palmer at that time?

A. In 1950, yes, we were living in Palmer, that is, three miles out on this farm.

Q. In November of 1950?

A. In November, 1950, in 1950.

Q. Were you a single man at that time?

A. Yes, I was.

Q. Do you recall the circumstances—did Eva Nickita come to your place in November of 1950?

A. I beg your pardon?

Q. Did Eva Nickita come to your home in November of 1950? A. Yes, she did.

Q. Will you tell in your own words, if you will, the circumstances by which Eva came to your place?

A. Well, my wife and I had been separated for about, I'll say about two months and one evening after I got my chores and everything over with I was lonesome. I had been batching in a great big six-room house so I went over to my neighbors to see Kurtz just across the railroad track and highway

(Testimony of Theodore Roosevelt Glenn.)

about 400 yards, I will say, and drove in the yard and Mr. Kurtz and Charlie Rosseau was in the yard when I drove in and we talked there for a little bit. I don't remember about anything in [86] particular.

Mr. Kirkland: Your honor, I object.

The Court: Just eliminate those details and answer the question more directly.

A. I beg your pardon, sir?

The Court: Just eliminate the details and answer the question directly.

A. Well, I was getting to the point where I asked them if they knew where I might find a housekeeper. That was the point I was getting to and Charlie Rosseau said, you want a housekeeper? I said, yes, I would like to have one.

Mr. Shaw: Don't tell what they said, just tell what happened.

A. Then we got in the car and went to town, went through Palmer, went through Eklutna. It was getting late at night. We went to Minnie's, which I thought was her Aunt's house. I guess it was; I didn't know her at that time, and we went in and Charlie Rosseau saw the people first and went over to the bed and I stepped inside the door and they were talking to her, to Minnie.

Q. What were they talking about?

A. I don't know; I couldn't hear. I couldn't hear what they were saying, kinda leaning over talking to her and I couldn't hear a thing they was saying and wasn't paying much attention.

(Testimony of Theodore Roosevelt Glenn.)

Q. What was your understanding of the purpose of this trip? [87]

Mr. Kirkland: Objection, your honor.

The Court: He may state what he went there for but I think he stated that.

A. Yes, I did. It was a housekeeper.

Q. (By Mr. Shaw): Was Charlie Rosseau going to get you a housekeeper?

A. That was exactly it, and so the next I heard was Minnie says for her to get up and get her clothes on and, you know, we don't want you around here.

Q. Well, did the girl get up and put on her clothes?

A. She got up and was going to go with us as far as I know.

Q. You didn't—withdraw that—Did you ask her to go with you, yourself?

A. I didn't say anything to her at that time because they were getting her for me as a housekeeper; that was my intentions to get a housekeeper.

Q. Then what happened?

A. Well, the next I can remember we went into town and then we stayed in town and I took them home.

Q. Do you remember who all went to Eklutna, who was in the car with you, or however you went?

The Court: He has already testified to who went to Eklutna.

Mr. Shaw: He testified to certain people who

(Testimony of Theodore Roosevelt Glenn.)

went, your honor, but the question was if there were any others—who [88] all went.

A. To Eklutna?

Q. Yes, who was with you when you went there?

A. In my mind I can't remember of Charlie's wife being along but she could have been. I only remember Cecil Kurtz and Charlie Rosseau being along and Charlie Rosseau and Cecil Kurtz went into the house and I don't remember of his wife being there at all.

Q. And then you went back to Palmer? Then what happened?

A. We went back to Palmer and I took them home and I went home and Eva went with me.

Q. Did she go willingly?

A. She went willingly, seemed to be glad to go. I talked to her and told her I had a nice home and she seemed to be well pleased to go with me. I thought she was happy with the exception of times she seemed to get lonesome, except on several occasions.

Mr. Kirkland: I object. Let the counsel ask the questions.

The Court: Sustained. No use to let the witness ramble on.

Q. (By Mr. Shaw): How long did she stay at your place?

A. I am not sure, maybe three weeks or a month.

Q. What was your answer?

A. Somewhere between three weeks and a month, I think. [89]

(Testimony of Theodore Roosevelt Glenn.)

Q. Now, when you got to your house, was it in the night or daytime?

A. It was in night, early in the morning. It was getting along in the morning hours.

Q. About what?

A. Say it was about 2:00 o'clock or 3:00, possibly 3:00 when we got home.

Q. What did you do with the car, your car when you arrived there?

A. Left it outside the door in the yard.

Q. And then what did you and Eva do?

A. We got out and went in the house and I showed her the house and turned on the lights and showed her my house.

Q. Did you show her the entire house?

A. Yes.

Q. Room by room.

A. Radio and piano and nice furniture and the upstairs—had two bedrooms upstairs and one downstairs.

Mr. Kirkland: Objection again.

The Court: Objection sustained.

Q. (By Mr. Shaw): Did you prepare anything to eat that night? A. I beg your pardon?

Q. Did you have anything to eat immediately after your arrival?

A. I don't remember. [90]

Q. Did you go to bed that night?

A. Yes, we went to bed. We sat there for awhile.

Q. Did Eva do anything before you went to bed?

(Testimony of Theodore Roosevelt Glenn.)

What did she do between the time you arrived and the time you went to bed?

A. She looked the house over; she played the phonograph record player, which turns in on the radio and sitting there drinking beer in the meantime. I have beer. I usually always have beer and liquor in the house at all times, always have all my life and in the morning I get up and I usually like a drink and so I had beer.

The Court: You have answered the question.

Q. (By Mr. Shaw): Did she have any clothes with her? A. Yes, she had some clothes.

Q. Have a suitcase?

A. Yes, she had a suitcase.

Q. Did she unpack it that night? A. No.

Q. How long did she play the phonograph?

The Court: Well, that is immaterial.

Q. Now, try to refrain from going into too much detail, Mr. Glenn. When I ask you the questions tell us exactly what happened in response to my questions and stay away from extraneous details, if we can. The last question was: How long did she play the phonograph—I withdraw that question. Now, bearing in mind what I just said about telling only the explicit [91] details, will you tell what happened after you went to bed?

A. Well, I got tired and I went to bed. She was sitting in the chair drinking her beer and enjoying herself and pretty soon I told her when she got ready to go to bed to turn the light out and

(Testimony of Theodore Roosevelt Glenn.)

she came in and got on the bed with her clothes on.

Q. Where was your bed located?

A. My bed was just off the front room downstairs.

Q. A private bedroom?

A. Yes, a private bedroom.

Q. How many beds were in that house at that time?

A. Just three beds and a daveno bed.

Q. All located in one room?

A. No, two bedrooms upstairs and bed in each room and one downstairs.

Q. You had showed here these other beds?

A. That is right.

Mr. Kirkland: Your honor, I object to that line of testimony. That is completely immaterial whether he had shown her 50 beds or not.

The Court: When you bring out the fact there were several beds in the house then any question about showing her is immaterial.

Mr. Shaw: I shall attempt to have the witness tell the story as near as he can in his own words, your honor. [92] Will you present——

Mr. Kirkland: Your honor, I am objecting to that, what he is going to attempt to do. I think counsel should ask the questions.

The Court: You may ask him what occurred there or what he did but, of course, counsel has the right to insist that, rather than be allowed to tell it in narrative form it be made in response to questions and now, if you can get it out of him by ask-

(Testimony of Theodore Roosevelt Glenn.)

ing him what occurred without going into a lot of immaterial details, you may try.

Mr. Shaw: Very well, your Honor.

Q. (By Mr. Shaw): What happened after you told Eva to turn the light out and go to bed when she got ready?

A. She came in and got in bed with her clothes on and I told her if she wanted to sleep in my bed with white sheets, she would have to take her clothes off and couldn't sleep in sheets. She got up and took her clothes off and got in bed.

Q. With you? A. With me.

Q. Did you ask her?

A. I did not. She did it on her own. It wasn't necessary.

Q. Did she take all her clothes off?

A. She did; that was the way I slept. I suppose she took from that that was the way she should sleep.

Q. Did you ask her? [93]

A. I did not. I said take your clothes off.

Q. What happened?

A. I turned over and loved her up. She didn't object.

Q. Did you have sexual intercourse?

A. Yes, we did—naturally.

Q. How long were you in bed that night?

A. I don't remember. I wasn't working the next day so no hurry about getting up.

Q. Did you sleep late the next day?

A. I think we did, yes.

(Testimony of Theodore Roosevelt Glenn.)

Q. Now, during the three weeks or a month, as the case may be, while Eva was at your home, did she share your bed with you all the time?

A. Yes, she did. She slept with me every night that she was there and she had no objections. We had sexual intercourse occasionally. I don't think I am above normal in any way or any different from any other man but as far as sodomy is concerned I absolutely——

Mr. Kirkland: Objection, your honor.

The Court: On what ground?

Mr. Kirkland: The witness is merely rattling away. He has never been asked about anything of that nature.

The Court: What he is talking about now is relevant and so the fact that it is not in response to the question does not make any particular difference what he says. [94]

Mr. Kirkland: Never asked about what he did. He is telling about what he didn't do.

The Court: The only one who can object to an answer as not being responsive is the person who conducts the examination. If it is relevant—well, he is the only one who can object to it.

Mr. Shaw: Now, Mr. Glenn, you have testified that you had sexual intercourse. Did you at any time with Eva Nickita have any other kind of intercourse other than the normal sexual intercourse?

A. Absolutely not. I have been a married man for 19 years. That never entered my mind. I wasn't raised that way in the first place; I was raised a

(Testimony of Theodore Roosevelt Glenn.)

church member, even though I don't go to church.

Q. You heard the testimony of the prosecutrix on the stand here? A. I did.

Q. Are the statements—any of them—that she made in regard to placing of your tongue on her private parts true? A. Absolutely not.

Q. The other statements in regard to the back is there any truth in any of those?

A. No, absolutely not. That isn't true. I don't know where she got that or what caused her to say it even.

The Court: Well, we will recess at this point for [95] five minutes.

(After a short recess court re-convenes and the following proceedings were had:)

The Court: You may proceed.

Q. (By Mr. Shaw): Mr. Glenn, did you at any time ever put your lips on the private parts of Eva Nickita? A. No, I did not.

Q. Did you at any time ever place your penis in her anus? A. No, I did not.

Q. During the three weeks or a month which you said that she lived at your place what were you doing by way of occupation, if any?

A. I was doing construction work off and on, not steady.

Q. You did work some?

A. Yes, I was working out at the Experimental Farm on a construction job part time.

Q. Was that on your own farm?

(Testimony of Theodore Roosevelt Glenn.)

A. No, the Experimental Farm up in Matanuska Valley.

Q. How many hours or days did you, during this period, did you work there one or two or more——

A. Well, at least a week out of the time she was there.

Q. Now, where was Eva while you were doing this work? A. At home.

Mr. Kirkland: Objection, your honor; he couldn't possibly know where she was if he wasn't there. [96]

The Court: I guess his answer would have to be taken with whatever inference the jury wants to draw from his answer.

Q. (By Mr. Shaw): Was she at the house when you left to go to work? A. That is right.

Q. Every time? A. Yes.

Q. Did you always find her there when you came back? A. Yes.

Q. Did she do any—what did she do while you were gone, if you know?

Mr. Kirkland: Your Honor, I object to that. How does he know?

Mr. Shaw: He would see if she did work around the house. He would see the evidence.

The Court: What difference would it make? Objection sustained.

Q. (By Mr. Shaw): Do you know what she did?

The Court: That is just the question to which the objection was sustained. What she did is immaterial. There is only one occasion involved in this

(Testimony of Theodore Roosevelt Glenn.)

prosecution. What she did outside of that is certainly not involved in this case.

Q. (By Mr. Shaw): Was she free to come and go? A. Yes, she was.

Q. How did she happen to leave your place?

A. Beg pardon?

Q. How did she happen to leave?

A. To leave?

Q. To leave your place, yes.

A. Well, I was going Outside to see my mother because Mother was old and I figured it would be the last time I would get to see her and I went Outside for Christmas. I wanted to go out for Christmas so I left on the 20th of December and I took her to Eklutna on the 19th.

Q. Took?

A. Eva Nickita—to see if I could leave her down there while I was Outside.

Q. Did you explain that to Eva?

A. Yes, I did.

Q. Whose house did you take her to?

A. I took her to her sister's house, Catherine Theodore.

Q. Did you tell her you would—what did you tell her, if anything, in regard to the time you returned?

A. I didn't tell her when I was going to return because I didn't know how long I would stay out but I took her down there and I went in—she went in first and I took her suitcase and set it on the porch and she told me——

(Testimony of Theodore Roosevelt Glenn.)

The Court: You have answered the question.

Q. Did you make arrangements to pick her up again when you came back? [98]

Mr. Kirkland: Your honor, I am going to object. I hate to keep objecting on things that are irrelevant.

The Court: Objection sustained.

Q. (By Mr. Shaw): Did Eva ever go to your place any more after that? A. No.

Q. Did you see her or hear from her after that?

A. Yes.

Q. Will you tell the jury what it was—what you heard?

A. After I came back, I don't remember just how long after this, I got a letter from Eva Nickita, which the District Attorney has, and she asked me in the letter for $10.00. Outside of that there was nothing bad about the letter except at the end somewhere within the letter she stated that if I didn't send it I would be sorry. I don't know what the threat meant or why I would be sorry.

Mr. Kirkland: Your Honor, I object. Please ask the witness to answer the questions.

The Court: Well, you have to object on the ground that what he is saying is incompetent and irrelevant, not merely it is not responsive. I have been ruling that for years around here.

Q. (By Mr. Shaw): During the time Eva stayed in your home did you ever strike her?

A. No. [99]

(Testimony of Theodore Roosevelt Glenn.)

Q. What was your relationship? Did you quarrel?

A. No, I was very good to her. In fact, nearly every night I come home I met her and would go up and put my arms around her.

The Court: You have answered the question.

Q. Now, Mr. Glenn, did you hear the testimony of the witness named Glasscock here yesterday?

A. Was I here?

Q. Did you hear his testimony? Do you recall it?

A. I couldn't hear it very good from where I was but I heard part of it.

Q. Did you understand—was it your understanding that he made some accusations?

A. Yes, I did.

Q. Since—you have been in jail here quite a while have you not? A. That is right.

Mr. Kirkland: Your Honor, I object to that. However, I request the right to bring forth why he has been in jail so long if counsel wants to go into——

Mr. Shaw: I withdraw the question, your honor.

Q. Have you been in jail with Mr. Glasscock?

A. Yes, I have.

Q. Did you ever have any conversations with him in the jail?

A. Oh, just possibly talking to him in the middle of the floor [100] or something like that, very few.

Q. Did you ever have any such conversation as he stated on the witness stand yesterday?

(Testimony of Theodore Roosevelt Glenn.)

A. I beg your pardon?

Q. Did you have such a conversation as he described on the witness stand?

A. Absolutely not.

Mr. Kirkland: Objection, your honor. The defendant stated he didn't hear all of it.

The Court: He was evidently told. It would not make it improper to ask him.

A. I heard that.

The Court: The question whether he had such a conversation even though he was told what the conversation was would be proper.

Mr. Kirkland: The defendant on the stand stated that he did not hear all of the conversation and then the counsel asked him if he had any such conversation about this and he said absolutely not.

Mr. Shaw: Any such conversation as what the witness heard.

Mr. Kirkland: Maybe we should establish what the witness heard.

The Court: No, I think he could come right out and say he was told Glasscock testified to so and so. Is that true? [101] Nothing wrong with a question of that kind.

Mr. Kirkland: I agree with his honor if Glasscock said so and so, is that true. He said, did you have any such conversation? He said, no.

The Court: I understand. It is a rather technical point. You can bring that out in cross examination. It is not a basis for objection now.

Q. (By Mr. Shaw): Now, Mr. Glasscock yes-

(Testimony of Theodore Roosevelt Glenn.)

terday said you admitted to him that you had sexual intercourse with Eva Nickita and that you put your tongue on her private parts and as far as I recall that you took the back road or words to that effect. Did any conversation such as that take place? A. Absolutely not.

Q. Did you ever talk to Glasscock about any of those things? A. No.

Q. Did you make—Glasscock also testified, according to my memory yesterday, that you made him a proposition over in the Federal jail. I believe the words he used was you asked him if he would go down on you, did any such conversation as that ever take place? A. Absolutely not.

Q. Do you ever remember while in jail having any private conversations with Glasscock?

A. No.

Q. Between you and him? [102] A. No.

Q. Mr. Glasscock also stated, if I remember correctly, that you told him that Eva was 14 years old. At the time he said you made these other statements did you ever state that?

A. I didn't say that and I couldn't because I didn't know for sure.

Mr. Shaw: Your witness.

Cross Examination

By Mr. Kirkland:

Q. Mr. Glenn, did you state that you did not slap Eva Nickita? A. That is right.

Q. Did you ever make a statement? Did you

(Testimony of Theodore Roosevelt Glenn.)

make the statement to Mr. Jack Jenkins of the Alaskan Native Service and the Deputy Marshal, Oscar Olson, that you did slap her?

A. Not that I know of—that I remember of.

Q. Did you make a statement to that effect?

A. No.

The Court: You should call his attention to the time, place and circumstances.

Q. (By Mr. Kirkland): That was immediately after your arrest and while being taken over to the Federal jail—to be more specific, on the way in from Palmer to the Federal jail? [103]

A. I beg your pardon?

Q. To be more specific, did you make that statement on the way in from Palmer to the Federal jail here at Anchorage in the company of Jack Jenkins and the Deputy Marshal, Oscar Olson?

A. If I made such a statement I don't remember saying it.

Q. Were you drunk the night you went to Eva Nickita's house? A. No.

Q. Did you make a statement to Jack Jenkins of the Alaskan Native Service and the Deputy Marshal, Oscar Olson, on the way from Palmer to the Federal jail here in Anchorage that you would not have done this unless you were drunk?

A. I did not.

Mr. Butcher: Done what? Specify it.

The Court: I think you ought to call to his attention the entire conversation and the exact

(Testimony of Theodore Roosevelt Glenn.)

words in which it was told. The law entitles him to having his attention called to it in that manner.

Q. (By Mr. Kirkland): Did you make the statement to the Deputy Marshal, Oscar Olson, and Jack Jenkins of the Alaskan Native Service on your trip from Palmer to the Federal jail in Anchorage that you would not have been involved with this girl, that you would have not have been connected with her in any way if you had not been drunk the night you went to her house? A. I did not.

Q. While in the Federal jail, incarcerated along with David [104] Glasscock, did you make the statement to him that you intended to buy the testimony of your wife in this case and that you had changed your mind because your wife wrote you——

Mr. Butcher: Your Honor, just a moment, objection —have the courtesy to stop when I object. Your honor, Glasscock testified to no such conversation that he intended to buy the testimony of his wife.

The Court: He would not have to. He can lay a foundation for his impeachment by asking him if he had such and such a conversation.

Mr. Butcher: This is cross examination.

The Court: But he can lay the foundation for his impeachment.

Mr. Butcher: Beyond the scope of the direct examination.

The Court: Never beyond the scope of an examination to lay the foundation for impeachment —not subject to that limitation. But let me suggest

(Testimony of Theodore Roosevelt Glenn.)
that questions of that kind should be put in the first, rather than the third, person.

Mr. Kirkland: I beg your pardon?

The Court: Questions of that kind should be put in the first rather than the third person, that is, when you refer to what was said. In other words, it should be in the exact words that he is supposed to have made this statement and not in the third person. The reason for that is it is much more likely [105] to call it to the attention of the witness.

Mr. Kirkland: Yes, sir.

The Court: Now, if you can't state it verbatim, then of course you may state it in substance and effect.

Mr. Kirkland: Your honor, I will proceed to ask the question in this way:

Q. Mr. Glenn, did you make the statement to David Glasscock, while incarcerated at the Federal jail here in Anchorage, that yourself and your attorneys, Harold Butcher and Mr. Shaw, planned to call your ex-wife and that you were going to buy her testimony in your favor?

Mr. Butcher: Now, your honor——

Q. (continuing): and did you further state to the defendant, Glasscock—to the prisoner Glasscock that at one time she had agreed to this plan but that since that time she had changed her mind and said she would hang you?

A. That is the first I have heard of it.

Mr. Butcher: Don't answer the question. Your honor, there has been no testimony in this case

(Testimony of Theodore Roosevelt Glenn.)

whatsoever that his wife was present at any of the incidents that occurred; no witness has so testified. As a matter of fact, he knows that the wife was out during this period.

The Court: The truth of it is immaterial whether he said it.

Mr. Butcher: It must relate to the case, your honor, [106] how can it possibly relate to the case.

The Court: Well, it does relate to the case. All that it needs to tend to show is that there was consciousness of guilt or conduct inconsistent with innocence and it makes no difference whether what he said in any conversation is true or whether it was wholly made up.

Mr. Butcher: Well, guilt in some other matter or in this matter?

The Court: In this matter, of course.

Mr. Butcher: You are referring to statements on this case?

Mr. Kirkland: I am referring to testimony in this case.

Mr. Butcher: This case?

Mr. Kirkland: As far as I know—this case. Your honor, even if it were to another case, I don't know which one he was exactly referring to. It would certainly go to the defendant's character.

The Court: Statements of that kind can only be shown if they can reasonably be said to be inconsistent with innocence or to show a consciousness of guilt and not for the purpose of showing char-

(Testimony of Theodore Roosevelt Glenn.)

acter. You may answer the question. (Repeated) You may answer the question.

A. It is the first I ever heard of it. I didn't make that statement. [107]

Q. (By Mr. Kirkland): Mr. Glenn, did you ever—did you make the statement to David C. Glasscock, while you were incarcerated in the Federal jail here at Anchorage along with Mr. Glasscock, to the effect of that there was an old lady, an old grandma, that you referred to her as old grandma, that she was an elderly woman, approximately 85 years of age, stopped by your house one day.

Mr. Butcher: Your honor, unless the counsel can show that this is connected with this case in any manner at all I object to the question. It is wholly irrelevant. It can't prove anything in this case.

The Court: Counsel should know it must be connected with this case in some way. I, of course, have no way of knowing what is in his mind.

Mr. Kirkland: Your honor, I certainly feel that it is connected with this case. Could I make an offer of proof?

The Court: Well, is it an offer that may be made in the presence of the jury?

Mr. Kirkland: No, sir. Well, your honor——

The Court: I think counsel better approach the bench and you can state then what you propose to prove.

(Thereupon, counsel for the plaintiff and the defendant approached the bench and the proceedings were out of the hearing of the jury, and without the reporter.) [108]

(Thereupon, when the discussion was completed, counsel for the plaintiff and defendant resumed their seats and the following proceedings were had in the presence of the court and jury.)

Mr. Kirkland: No further questions.

(Thereupon, the witness was excused and retired from the witness stand, resuming his seat at the counsel table.)

Mr. Butcher: If your honor please, Mr. Shaw informs me we had a witness in the hallway a few moments ago and he assumed that Mr. Glenn's cross examination would consume the period until the noon hour and——

The Court: Are you through with him now?

Mr. Butcher: Yes, your honor. Mr. Shaw told him to return at 2:00 o'clock so if the court please we would like at this time to adjourn 15 minutes early and readjourn at 2:00 o'clock.

Mr. Kirkland: Your honor, I would be very agreeable. I am very anxious to have that witness take the stand.

The Court: I thought you meant you were agreeable to recessing.

Mr. Kirkland: Yes, yes, sir, I am very agreeable to taking a recess because I want that witness to get on the stand.

Mr. Butcher: That has nothing to do with your consent to take a recess. [109]

The Court: Well, is that the last witness?

Mr. Butcher: There will be a couple of character witnesses, your honor, and we will then rest.

The Court: Well, I have a matter set for 3:30 which I set not long ago thinking that we might conclude by that time. We should start in earlier perhaps than 2:00.

Mr. Butcher: If your honor will give me an opportunity to look out in the hall it is possible he may not have left.

The Court: Very well, ladies and gentlemen of the jury, the case will be resumed at 1:45. The court, however, will convene for other business at 1:30, so you should be back in the jury box at 1:45. Recess to 1:30.

(Whereupon, at 11:42 a.m., September 24, 1953, the court continues the cause to 1:45 o'clock p.m. of the same day.)

(At 1:55 o'clock p.m., September 24, 1953, counsel for plaintiff being present and defendant being present in person and by his counsel, the trial of said cause was resumed:)

The Court: It has been necessary to excuse the juror Mrs. Reekie. There is a certificate of her physician on file here if counsel wish to examine it.

Mr. Butcher: That is according to our stipulation, [110] your honor.

Mr. Shaw: Call Mr. Ray Lancaster.

RAY LANCASTER

called as a witness on behalf of the defendant, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Shaw:

Q. Will you state your name and your place of residence, please?

A. Ray Lancaster, Palmer, Alaska. L-a-n-c-a-s-t-e-r.

Q. How long have you lived at Palmer, Mr. Lancaster?

A. Ever since '47 or '46 in and around Palmer and been there since '47 in Palmer.

Q. What is your occupation?

A. Carpenter.

Q. Are you acquainted with the defendant, Ted Glenn? A. I am.

Q. And how long have you known Mr. Glenn?

A. Since the first part of '47, sometime in the first half of the year '47, either March or April, or somewhere in there. I wouldn't know the exact month.

Q. How well have you known him?

A. I have worked with him through several different times on jobs along in '48, '49, '50. [111]

Q. Then you are well acquainted with him?

A. Well, yes, as to that effect I am.

Q. Are you familiar with the general reputation of Mr. Glenn in the Palmer community for his truth and veracity? A. Yes.

Q. And what is that general reputation?

(Testimony of Ray Lancaster.)

A. Well, it is good.

Q. Are you acquainted with Mr. Glenn's reputation in the Palmer community or wherever you have known him as to his moral character, his morals?

The Court: I think that I permitted the first question to go by but the reputation that may be evidence of reputation that is admissible in this case must be evidence relating to the traits of character involved in the charge, not as to moral character, not as to truth or veracity. You may ask him what his reputation is as a law-abiding citizen.

Q. (By Mr. Shaw): What is, if you know, Mr. Glenn's reputation as a law-abiding citizen?

A. Well, to my knowledge it is good, okay to my knowledge.

Mr. Kirkland: Your honor, I think counsel should rephrase his question as it is improper.

The Court: I can't give an instruction on it because it is based on his personal knowledge.

Mr. Shaw: That is all.

The Court: Well, the evidence will have to be stricken. [112]

Mr. Shaw: I misunderstood your honor.

The Court: The reputation consists of what people say about somebody, not a witness' personal knowledge. If he can testify as to the reputation of the defendant, it will have to be based on what the people of Palmer generally say about his being a law-abiding citizen and not what he thinks.

(Testimony of Ray Lancaster.)

Mr. Shaw: I thought I had the question phrased——

The Court: No, you did not.

Mr. Shaw: (continuing) that way.

Q. If you know, what is the reputation among the people of Palmer of Mr. Glenn as a law-abiding citizen?

The Court: You can answer that question if you know what it is. First answer: Do you know what it is? Do you know what his reputation is in Palmer and vicinity as a law-abiding citizen?

A. Well, the only way I can answer that as far as I am concerned to my own knowledge, what I know.

The Court: I understand that.

A. But I can't asnwer it that I went out and asked everybody as far as that part of it goes. It is my own knowledge, like personal knowledge, but from what I know or what other people had said is the only way I can form my opinion—not my opinion but my answer.

Q. (By Mr. Shaw): From the time you first knew Mr. Glenn until November of 1950, the time involved in this crime, would you say [113] his reputation in the community of Palmer among the people and the Matanuska Valley, would you say it was good or bad?

A. Well, I would still say it was good.

Mr. Shaw: That is all.

(Testimony of Ray Lancaster.)

Cross Examination

By Mr. Kirkland:

Q. Well, is that based on what people have told you or based on your personal knowledge?

A. On my observation and what people has said or told me.

Q. Mr. Lancaster, have you ever heard of Mr. Glenn bragging about making the most of the native girls in and about Palmer?

Mr. Butcher: Your honor, that is an improper question.

The Court: Objection overruled.

A. I have not.

Q. (By Mr. Kirkland): Well, then, if—have you ever heard him bragging among the community about making some of the native girls around Palmer? A. I have not.

Mr. Kirkland: That is all.

Mr. Shaw: That is all.

(Thereupon, the witness was excused and retired from the witness stand.) [114]

Mr. Shaw: The defense rests, your honor.

The Court: Have you any rebuttal?

Mr. Kirkland: Yes, your honor.

The Court: You may call your witness.

Mr. Kirkland: Your honor, I would like to call Mr. Jack Jenkins. I believe he is in my office.

The Court: No, he is here.

JACK JENKINS

resumed the witness stand as a witness on rebuttal for the plaintiff, and having previously been sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. Mr. Jenkins, when you brought the defendant in this case, Mr. Glenn, from Palmer to Anchorage and you arrived here at the Federal jail did the defendant make a statement to you to the effect that he was—would not have been involved with this young girl, Eva Nickita, if he had not been drinking and was drunk? A. He did.

Q. Did the defendant in this case at the same time make a statement to you to the effect that he had had to slap this young girl, Eva Nickita?

A. He did. [115]

Q. Mr. Jenkins, how long have you been acquainted with the defendant in this case, Mr. Glenn?

Mr. Butcher: Now, your honor, counsel just put the questions—the impeaching questions and they have been answered, which is the purpose of calling this witness in rebuttal. Counsel directed to Mr. Glenn on cross examination two questions: Did you at such and such a time from Palmer to Anchorage and the Federal Jail make such and such a statement about intoxication. The second question was about slapping. He has covered those two. He has put the questions to the witness. Now he is going to find out how long the defendant has known

(Testimony of Jack Jenkins.)

Mr. Glenn, which has nothing to do with the rebuttal or the impeaching of the witness.

The Court: I took it for granted that he was going to ask him about the defendant's reputation which would be rebuttal.

Mr. Kirkland: Correct, your honor.

The Court: You may ask him.

A. I first contacted Mr. Glenn approximately two years back.

Q. And you are the investigator for the Alaskan Native Service? A. That is correct.

Q. And you are familiar with Palmer and the citizens of Palmer and know numerous of the citizens of Palmer? A. Yes, sir. [116]

Q. Now, what do you know of Mr. Glenn's general reputation in Palmer to be?

The Court: Well, for what, general reputation for what?

Mr. Kirkland: As a law-abiding citizen.

Mr. Butcher: In objecting this witness has not testified that he is a resident of that area in which the reputation of the defendant—in which he might have such a reputation. He is simply an investigator for the Native Service and made a trip to Palmer, Alaska. Now, you certainly do not reside in the area and you would not be acquainted with the general reputation.

The Court: You can cross examine him but it is not a prerequisite that he reside in the same vicinity. Objection overruled.

(Testimony of Jack Jenkins.)

A. Would you mind rephrasing your question, please?

Q. (By Mr. Kirkland): What do you know about the defendant's general reputation in the Palmer area as to being a law-abiding citizen?

A. It is very poor.

Mr. Kirkland: That is all. Your witness.

Mr. Butcher: Now I ask that answer be stricken, your honor, because no proper foundation was laid. The question should have been put: Do you know the general reputation and if you do, what is it?

The Court: Well, that was asked in the previous question.

Mr. Butcher: He asked him what the general reputation was without ascertaining——

The Court: In the last question but previously he asked him if he knew what the general reputation of the defendant in Palmer or vicinity was. So the motion is denied.

Cross Examination

By Mr. Butcher:

Q. Do you know of any act of violation of the law committed by Mr. Glenn other than the one he is charged here with? A. Yes, sir.

Q. Do you know whether he has been convicted previously?

A. Excuse me, Attorney Butcher, you mean do I know of a previous conviction?

Q. Yes. A. No, sir.

Q. Do you know of any violation of the law

(Testimony of Jack Jenkins.)

of which he has been convicted of any kind anywhere? A. No, sir.

Mr. Butcher: That is all.

(Thereupon, the witness was excused and retired from [118] the witness stand.)

Mr. Kirkland: I would like to call Deputy Marshal Oscar Olson.

OSCAR OLSON

called as a witness on behalf of the plaintiff on rebuttal, and being first duly sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. Will you state your name, please, sir?

A. Oscar Olson.

Q. And what is your occupation?

A. Deputy U. S. Marshal.

Q. And how long have you been a Deputy U. S. Marshal? A. 1933.

Q. And then you were naturally a deputy marshal during the years 1950, '51, '52?

A. I was.

Q. Mr. Olson, did you accompany Mr. Jack Jenkins in bringing the defendant, Mr. Glenn, from Palmer to the Federal jail here at Anchorage and have a conversation during that ride and after your arrival here? A. I did.

Q. Did you hear the defendant Theodore Roosevelt Glenn make a [119] statement to the effect that he would not have been involved with this

(Testimony of Oscar Olson.)

young girl, Eva Nickita, if he had not been drinking or was drunk? A. He did.

Q. You heard him make that statement?

A. Positive.

Q. Did you hear the defendant at the same time make a statement that he had slapped this young girl? A. He did.

Mr. Kirkland: Your witness.

Mr. Butcher: No cross.

(Thereupon, the witness was excused and retired from the witness stand.)

Mr. Kirkland: I would like to call David Glasscock back to the witness stand, your honor.

DAVID C. GLASSCOCK

resumed the witness stand as a witness on behalf of the plaintiff in rebuttal, and having previously been sworn, testifies as follows on

Direct Examination

By Mr. Kirkland:

Q. Mr. Glasscock, did the defendant in this case, while you were incarcerated at the Federal jail, ever make a statement to you that he had had intercourse with most of the natives in and [120] around the Palmer area? A. Yes, sir.

Mr. Kirkland: Your witness.

Mr. Butcher: Your honor, it is my recollection that your honor sustained the objection to that question on the grounds that it was regarding other crimes, not relating to this, other offenses.

(Testimony of David C. Glasscock.)

The Court: I do not remember whether I ruled on anything like that but I think it is improper. You move to strike it?

Mr. Butcher: I move to strike it, yes.

Mr. Kirkland: Your honor, I feel as though the question is proper due to the fact that as a character witness I asked him if he had ever heard of the defendant bragging about such things as the character witness on behalf of Mr. Glenn says no.

The Court: Well, that would not prove that the character witness had heard of those things because this person had heard of them. The motion is granted and the jury is instructed to disregard the present witness' testimony.

Q. (By Mr. Kirkland): At the time of your incarceration in the Federal jail here in Anchorage along with the defendant in this case, did he ever make the statement to you that he had slapped Eva Nickita? A. Yes, sir. [121]

Mr. Kirkland: Your witness.

Mr. Butcher: Your honor, I must depend upon my recollection but I have had it verified just a moment ago—it is my recollection that this question as to this slapping of Eva Nickita was never put to this witness or to Mr. Glenn on the witness stand. Now, in cross examination Mr. Glenn testified that he had never told Jack Jenkins, never told Oscar Olson that he had slapped Eva Nickita. The question was not put to him as to whether or not he ever told Mr. Glasscock and if that is—if my rec-

(Testimony of David C. Glasscock.)

ollection is correct, then that question put to this witness is not proper rebuttal.

The Court: My recollection is that he was specifically asked whether he ever slapped her.

Mr. Butcher: He was specifically asked if he ever slapped but the impeaching question was as to whether or not he told this witness that he slapped Eva Nickita.

The Court: It is not an impeaching question; it is merely contradiction.

Mr. Butcher: That is all. I have no cross.

(Thereupon, the witness was excused and retired from the witness stand.)

The Court: Have you any other witnesses?

Mr. Kirkland: Your honor, after some of the court's rulings I wonder if I could offer testimony as to the complaining witness' good character? [122]

The Court: I do not think that there is any—I do not think the situation is one to make it necessary. There has been no evidence expressly attacking her character.

Mr. Kirkland: Other than what has been stricken.

The Court: Other than what?

Mr. Kirkland: There has been some that has been stricken.

The Court: In every case there are contradictions of witnesses and even something perhaps derogatory of her but that does not open the gate for the introduction of reputation evidence for the purpose of rehabilitation.

Mr. Kirkland: I have no further rebuttal then.

The Court: Any surrebuttal?

Mr. Butcher: No surrebuttal.

The Court: You may proceed to argue the case. Counsel will be limited to half an hour for each party.

Mr. Kirkland: Does his honor mean a half hour all told?

The Court: Yes; you think that is too short?

Mr. Kirkland: Yes, sir.

The Court: Well, an hour is the limit permitted by the rules in a case that was a good deal longer than this—only a few hours testimony in this case.

Mr. Kirkland: Mr. Shaw, Mr. Butcher, Judge Folta, ladies and gentlemen of the jury, you will remember from my [123] opening statement I said that I was certain that after you heard the evidence you would return a verdict of guilty. Now, we shall sum up the testimony of the various witnesses in this case.

First, the complaining witness and victim, Miss Nickita took the stand. Now, I had some difficulty eliciting information from her and I think all of you know why and I think that everyone of you finally understood what her testimony was and no doubt in your mind. She testified that the defendant in this case came to her residence where she was staying with her—I believe it was Aunt Minnie Nelson. She referred to her as Aunt Minnie, who was the third cousin of a second cousin of hers, I believe, or something of that nature. She testified that she was reluctant to go. She did not want to go but that they told her to go and that she went;

that upon arriving at Palmer at the defendant's house that shortly thereafter they went to bed; that the defendant got on top of her; that he put his tongue on the private parts of her body; that he then told her to get around to the rear. Now, it seems as though people had a hard time understanding what they meant by the rear and this young girl had to get up and point and I think she definitely pointed to what took place there and testified as to what happened then.

The next witness who took the stand was Mr. Glasscock. Testifying in behalf of the Government he testified that while [124] incarcerated in the Federal jail that the defendant stated to him that he had had intercourse with her in the anus, the front and that he had eaten it and that that was the best part. That is what the defendant in this case stated to the witness Glasscock.

The next witness that appeared was Mrs. Minnie Nelson. She could not remember all the convictions she has had.

Then the defendant took the stand and he denied all of what that statement was. Now, the court will instruct you that you have the right to look at this evidence and you can take into consideration as to who has the most interest in the outcome of this trial. Now, who do you think has the most interest in the outcome of this trial? Miss Eva Nickita, Mr. Glasscock or Mr. Glenn? The defendant. The defendant made denials, said that he did none of this other than take her to his house as a housekeeper and that he did nothing but have a little

intercourse with her, nothing further. He stated that he was not drinking that night; that he had never slapped her but you certainly heard testimony which is contradictory to that. You heard the testimony of the character witnesses that the defendant put on before you—one character witness anyway and I frankly do not see how you can have any doubts in your mind as to the guilt of the defendant, Theodore Roosevelt Glenn in this case.

Mr. Shaw: Your honor, Mr. Kirkland, ladies and [125] gentlemen of the jury, Eva Nickita, to refer to her testimony, the girl who admitted that she was 19 years of age, in whose case further testimony about her age was not entered, has admitted to you that she went to Mr. Glenn's home and lived with him there. She testified that in regard to the matter of sex the first thing that took place was normal or natural sexual intercourse. Then she alleges that these other things took place. It was not until two years after this crime is alleged to have been committed that the prosecutrix here made her complaint—for two years she remained silent. I think that that is a very pertinent and significant point for this jury to consider in arriving at a verdict.

You have heard the testimony of Mr. Glenn and Miss Nickita both on this point and I think there is no doubt that during the three weeks or a month that this girl lived in his home and when Mr. Glenn was feeding her and taking care of her that she was free to come and go as she pleased. He was away at work a large part of the time. In fact,

most of the time and she stayed there; there was no question she could have left at any time, no evidence but what Mr. Glenn treated her with the greatest of kindness. If you will recall the testimony of Minnie Nelson, the native woman, when the girl came home she was wearing a ring and she seemed happy to have been at Mr. Glenn's place and quoted a conversation between him and her as to her going back there. Mr. Glenn is a successful farmer in [126] the Matanuska Valley and a carpenter. You heard Mr. Lancaster there who is also a carpenter in Matanuska testify that his reputation is good. You heard Mr. Jenkins on the witness stand. Though he testified that his character was poor Mr. Jenkins is not a resident of the Palmer area and Mr. Jenkins admitted that he knew of no crime of which Mr. Glenn has ever been convicted. I would like to impress upon you the testimony of Mr. Glenn where he told you that he has lived in Alaska since 1939. That is 15 years. That he was a married man for 19 years. That he and his wife had two adopted native children. There was a divorce all right not so very long before this alleged crime took place and the wife took the children but for 19 years he was a family man with a wife and, in more recent years, the native children. It does not make sense that a man, a family man like that, the man you have seen on the witness stand—you have heard his testimony. It is clear to see what kind of a straightforward witness he has made. I think it should be clear that he is not capable of committing this kind of a crime.

In regard to the witness Glasscock, he is a convict. The prosecution has brought him up from the penitentiary here to testify. That is something that often happens in criminal cases. I think he was a poor miserable creature on the witness stand there. What has he to lose by coming up here to testify to anything like this? He might have something to gain. What I do not know but he certainly has nothing to lose. What could [127] be his motive in telling such a story? Along that line it is common knowledge that the Anchorage jail over here is one large room and that it is full all the time; it is common knowledge and I invite your attention to that and ask that you bear that in mind that with a jail full of prisoners how could such an act as Mr. Glenn is alleged to have solicited with this man Glasscock have taken place in that large one-room jail full of prisoners—30 to 60 prisoners in there sometimes.

Also remember the testimony of Miss Nickita in which she admitted she had written Mr. Glenn a letter demanding money from Mr. Glenn. Also Mr. Glenn testified to the same thing that he had received such a letter sometime after she had stayed at his place. I think that is a significant thing. Bear in mind here is a native girl who voluntarily goes and lives at a man's home, who goes away, goes back to Eklutna, saying that she liked him; she was happy there and who then later writes him a threatening letter demanding money and who two years later brings these charges, alleging the most difficult type of a crime to handle in a

court of law—most difficult case. We are all aware of the embarrassing problems involved in a case of this kind, a case where it is the word of the prosecutrix against the defendant—her word against his. The jury has to believe one or the other and the man's liberty depends on that.

Now the court will instruct you on the law of reasonable [128] doubt and it will go something like this: That you must find upon the evidence to convict that the defendant is guilty beyond any reasonable doubt. The presumption of innocence goes with the defendant as a cloak until he is found guilty upon the evidence beyond any reasonable doubt and I know that you ladies and gentlemen of the jury will carefully weigh the evidence in this case, will consider the terrible position that the defendant is put in defending himself against the word of one person who says he committed a crime which he says he did not commit.

Thank you.

Mr. Butcher: Your honor, Mr. Kirkland, ladies and gentlemen of the jury, it has been necessary and regrettably so that you have been exposed to considerable sordid details in connection with the alleged crime. It was necessary ladies and gentlemen because the appetites and the functions of the human body are well known to all of us. Some of the things in connection with the human body we publicly set aside and put behind a screen, although we are all aware of them we do not talk about them. But in circumstances of this nature where a crime is alleged to have been committed it is neces-

sary to go into the greatest detail and it is embarrassing to you as jurors; it is embarrassing to counsel and to the court, I am sure, to have to expose in public things of this nature which normally are not mentioned and which we consider as unmentionable among decent people. [129]

The witnesses—their testimony has been before you; you are capable of judging as well as any one. I do not intend to rehash that testimony. I point out to you only that Mr. Glenn frankly, candidly admitted that he was lonely; he wanted a housekeeper and he wanted a companion and that friends solicited for him a native girl to come and live with him and he testified that he went with his friends to the Eklutna Village, to the home of one Minnie Nelson and there arrangements were made for a native girl to come and be his housekeeper. He testified that he was kind to her; he testified that he had considerable intercourse with her. Now, ladies and gentlemen, you are all experienced in this world and things are certainly apparent to you. There are forms of perversion which certainly you are familiar with and have observed in people before. It is most unusual for the person to seek sexual satisfaction in a normal way and then seek sexual satisfaction in some abnormal way. There are abnormal people in the world who find satisfaction for their sexual senses by seeking abnormal outlets and, as a matter of fact, that is the only way they can find sexual satisfaction—in the abnormal way—either with man with man and with woman with man and it is a perverted form. It is

not unusual and does not fit in with the character of the persons who are afflicted with the abnormality to seek normal sex.

Now, the witness, Mr. Glenn, has testified that he did have carnal intercourse with her and if he did it is a terrible [130] thing. I do not attempt to condone him or justify him at all but it is a satisfaction to human appetite that we in Alaska have observed and have known of in thousands of instances and where men have taken native wives and lived with them and raised fine families without a marriage ceremony. Perhaps in frontier countries elsewhere in the early days of the United States it has occurred. I do not attempt to condone that. I pointed out that he was certainly guilty of illegal cohabitation. We find the young girl testifying that she went against her will. That is easy to say now that she is no longer with Mr. Glenn; there are certain aspects of the testimony, however, that are important to note: That she went elsewhere and obtained the—as near as I could understand from her difficult method of expression was that she went to her sister's house and got her suitcase and put her belongings into it. I could be wrong about that. I thought she said that but as I pressed the question it may be that she said she got the suitcase from Minnie's house. She got the suitcase and took her belongings with her. She testified that she went because she was told to go; she didn't testify that anyone coerced her into going. No one twisted her arm or forced her into the car. Her Aunt went with her—her closest relative that has

appeared in this case, although there has been indirect evidence here that she had other sisters or brothers—in any event a relative went with her as far as Palmer and consented to her going to be Mr. [131] Glenn's woman or his housekeeper.

Now, certainly the complaining witness, Eva Nickita, has after two and a half years come into court and told this story to you. She did not tell this story to anyone at the time and when she returned to the Village at Eklutna——

Mr. Kirkland: I object to this at this point—there is no evidence that she told any one at the time or not.

Mr. Butcher: Well, it is true, there is no evidence before this court. That is my statement.

The Court: It is in negative form, no evidence of that kind so it is not improper.

Mr. Butcher: There is no evidence before this court that she told anyone for a period of approximately two years but we do have now. She is the complaining witness and Mr. Glenn is the defendant. Of course, they both have their interests to be served here in the court but the relative Minnie, an old native woman—of course she has been arrested for drunkenness; many people have been arrested for drunkenness and many natives. It is a great sin and a curse and a blot upon the people of Alaska and upon our communities that we expose our natives to such a thing. We know, as women and men in this community that that does happen, that natives get liquor and cannot handle liquor like the brothers and sisters in the white

race handle it. It is a shame that it exists and something should be done about it. Nothing ever will, at least [132] under our present system. We know it happens; you have seen it in everyday life. Sure the old lady has been arrested and convicted of drunkenness but that does not affect her ability to sit up on this stand and tell the truth. Why should she do other than tell the truth? There is no reason why she should come into court and tell this story against the interests of her relative and for Mr. Glenn other than it is true. She said that Eva came back and displayed a wedding ring or a ring and that she stated that Mr. Glenn had gone outside to visit his mother who was dying and that he was going to come back and she was going to live him him. She didn't tell any part of the story about mistreatment; didn't tell anything about abnormal relations to this old lady and sometime after this she goes elsewhere and lives. She admitted on the witness stand, ladies and gentlemen—and this is important—that she wrote a letter to Mr. Glenn. She wasn't finished with him yet. She wrote a letter to him and told him that she wanted some money and that if she didn't get the money or he didn't send it to her she would cause him some trouble. Now, that is a form of blackmail. Mr. Glenn did not respond to that threat of blackmail; he ignored it and perhaps the fact that he ignored it resulted in his being in court today. I do not know. I do not know the answers to those things and I am simply pointing them out to you myself. Miss Nickita, prior to telling anyone about her story,

about any mistreatment, attempted to extract some [133] money illegally from Mr. Glenn. The amount of money is insignificant. It may have been a great sum to this girl. This girl was either 16 or 17 years of age and that is uncertain. She testified that she is 19 now, although she did not say when her birthday was. If her birthday was sometime in the past she was probably 17 at this time, which is maturity in almost any person. Many people of our own race have married as early as 15. For purposes of illustration I mention the history or that I was reading just recently a diary of an old woman who stated when she was 15 years of age she longed for her own cabin and her own homestead and so could have her own family and she married at 15 and we know from our common knowledge that that has often happened. I believe within our own knowledge and observation that native girls mature earlier than girls of our own race and certainly at the age of 17 the girl knew what she was doing and was willing to do it and when it did not turn out the way she expected or for some reason known only to her she has brought the accusations into the court.

Now, as to the proof itself, there is no question that through the leading questions that counsel was permitted to ask of this young girl she did certainly set forth the fact that Mr. Glenn placed his mouth upon her private parts and I think there was no doubt about that testimony so far as it went, if it were true, but there is a considerable lack of proof as to the crime alleged in Count III of the

indictment, which you will have [134] in your possession in the jury room. In this count, as you will recall and as you will know when you read it again, Mr. Glenn is accused of putting his penis into her anus and the only testimony we have now—understand ladies and gentlemen, you have taken the most sacred oath which you can, sitting in judgment on your fellowmen, to examine the evidence. If you find evidence sufficient to convict on any one of these counts it is your duty to convict. Now, is there enough evidence in connection with the crime of sodomy, that is, that he put his penis into her anus. It was with great difficulty that counsel was able to extract the story from her. Finally she said that he went to the back. Now she did not say he put his penis into her anus and she said he went on the back and pointed to the buttock and stood sideways when she did it and she pointed about that far. (indicating) Ladies and gentlemen, there is not a scintilla of evidence that he penetrated the anus; that he put his penis in the anus. In connection with Count III I ask you to observe that. It is your right to observe it and if you think about it, if necessary to reconsider the evidence on that particular question.

I candidly admit, if it is true, that in Count II, if she is telling a true story that there is sufficient evidence there but not in Count III.

Ladies and gentlemen, just one more reference to the testimony of Mr. Jenkins. Mr. Jenkins took the stand and very [135] readily upon suggestion by counsel said that Mr. Glenn's reputation as a

law-abiding citizen in Palmer was poor. He said it was poor, yet he was unable to give a single example of where Mr. Glenn had been convicted of a crime and now, how can we judge whether a person's reputation is poor unless we know they have been convicted of a crime. He knew of none so he was ready and willing to expose to you ladies and gentlemen the worst possible picture in an effort to obtain a conviction.

Now, in closing I can only ask you to compare the evidence. Now, understand that Mr. Glenn is charged with the most serious crime and the proof of it lies on the lips of a girl who at least—and this is within the ability of the jury to observe—at least on the indictment itself, which will be in your presence, there is an inconsistency in the age and also that she admitted on cross examination that she tried to extract money from him and told told him she would get him in trouble. She waits two years and then when the detective, the investigator for the Alaskan Native Service gets hold of her this thing comes to light. Why I do not know. Consider the seriousness. Here is a man who if convicted of this crime will be sentenced and he will be sentenced on the words of a young girl whose mental ability, as displayed upon the witness stand, is very low, very low indeed—19 years of age now—a young woman, mature in every way except mentally, unable to express herself, unable to answer straightforward questions, unable to give facts [136] of any kind but perhaps one who has a vivid imagination and susceptible to sugges-

tion. As you will recall she testified that Mr. Jenkins for the first time before Dorothy Saxton, the Commissioner, put these questions to her and was always ready, willing and able to answer the questions. Now, the case is yours. I am sure any verdict you arrive at in reporting to this courtroom will be a just verdict. I have no doubt about that. I only ask you to consider the seriousness of the charge and the correctness of the testimony and the type of the testimony.

Mr. Shaw very ably analyzed this testimony and I have not mentioned Mr. Glasscock previously because I consider the man a miserable character. I would consider that his testimony was not worth belief. It just does not make sense that the defendant would go and tell somebody of these things he did when he is in the jail awaiting the charge and particularly to tell that the girl was 14 years of age when it is to his every interest that she be more mature and older. Does that make sense? Would any sensible person do it? Didn't Mr. Glenn impress you as one possessed of reasonable intelligence. Ladies and gentlemen, that was made up from whole cloth, in my opinion, to serve some interest that Mr. Glasscock has and is not worthy of belief. Ladies and gentlemen, I rest the case with you with those brief words and trust you will be able to recollect the testimony and do justice in this case as you see fit.

Thank you. [137]

Mr. Kirkland: Your honor, Mr. Shaw, Mr. Butcher, ladies and gentlemen of the jury, now, let's

sum up what Mr. Shaw said in his statement. He said that this young girl was free to come and go. Now, how free would a 16-year-old native girl out on a farm with no place to go be—how free would she be to come and go with no more education than this young girl has and no more intelligence. Then he makes the story about the defendant feeding her, taking care of her and how he came to get her as he wanted a housekeeper. Now, if the defendant wanted a housekeeper and he testified himself that she didn't do any work around there. Also, he said that after three weeks of keeping her when he had to leave he made arrangements to take her back. Now did he want a housekeeper or what did he want? When he testified that she didn't do any work around there it is pretty obvious what he wanted. Then Mr. Shaw was talking about the witness Minnie. Now, let's stop and just consider what Mrs. Nelson testified to. You will remember on the witness stand she testified that first when the defendant Glenn arrived and the rest of his party that they were all in bed. You remember that, were all in bed. And then the next thing you know, he says that Eva was up and had her clothes on when they got there and go off and then on top of that the defendant Glenn takes the stand and says he heard Minnie say to Eva, get up and put your clothes on; we don't want you here. That is the defendant's own testimony as to what he heard said and yet [138] what choice did this girl have? She didn't have her parents; she was with a second cousin of a third cousin, or whatever the relation-

ship was. She didn't want her. Where could she go? They tell her to get up and put your clothes on. We don't want you here. Mrs. Nelson says they were not drinking, were not drunk. The defendant said he was not drunk, yet the defendant tells Oscar Olson he was drinking. He tells the investigator, Jack Jenkins, that he was drinking or it would not have happened. He made the same statement over in the jail to the witness Glasscock. Now, another thing, stop and consider what this witness Nelson was doing; she was trying to do everything she could to help the defendant in this case, Theodore Roosevelt Glenn. She even went so far as to say she never discussed anything about what her testimony was going to be here today. How in the world would she have ever gotten to the witness stand if she had not talked it over with the attorneys. I merely ask you that to show what lengths the witness would go to. You have heard inconsistent statements. She says she can't remember all of her convictions. I have not been in Alaska a long time. I have been here a year or longer. I do not think the native population as a whole all have a reputation of being drunkards and good-for-nothings. I think that was a gross injustice for counsel to make any such statement. Some, yes.

Now, then, the next thing Mr. Shaw tossed about was the Government's witness Glasscock. He said, oh, that man is a [139] convict: you can't believe him. True, he is a convict. He was convicted in this court by your present members of the United States Attorney's office, a young boy on his first convic-

tion and now serving time at McNeil Island. I do not know what particular love he would have for our office that he would come back up here to help us. We do not have any control over him but I do admire the boy for being honest and trustworthy and truthful now.

The next thing Mr. Shaw talked about—he said, now this proposition that the defendant was supposed to have made to Mr. Glasscock over at the jail—one big room—now, there is one big room but there is also a little room, the little boys' room. Don't forget about that room. And one thing I want to impress upon you that that is not merely the case of the prosecution against that of the defendant. You heard Miss Nickita testify and tell exactly what happened as to her version and then on top of it you heard the statements that the defendant made in the jail to the witness Glasscock. Now, the defendant denies everything, he denies that he had ever slapped her, denies that he was drinking, yet the deputy marshal Olson, the criminal investigator for the Alaskan Native Service, Mr. Jenkins, they stated that the defendant told them that it would not have happened if he had not been drinking and drunk; that he had to slap her. He stated that to Glasscock also. He has lied there. And then Mr. Butcher started his argument.

Now, Mr. Butcher stated that he regrets all the sordid details that had to be brought out. I think that Mr. Butcher didn't regret them too much. When I was asking the questions of the witness it was obvious to all of you. And he starts talking

about people seeking the normal type of desire and then the abnormal. Now, Mr. Butcher said a man would not do the normal act and then the abnormal act. Well, now, let's just wait a minute. I did not hear any evidence or testimony or anything else that this defendant completed the normal acts before he started in the other. For all I know his passions rose as he started in the normal and that is what I must assume from the testimony that has been given here and then he says that you heard the witness Jack Jenkins take the stand and say that his reputation was poor but that yet Mr. Jenkins could never tell you of a conviction. He was asked if he knew of the defendant having any prior convictions. Well, that is something to consider but I will tell you something else. You can consider that as to his reputation as a law-abiding citizen. I imagine if John Dillinger had been apprehended before his death and were on the witness stand, could anyone have gotten up and said he has prior convictions? Yet look at his reputation and I want you to consider that as to the value of this now.

Another thing, ladies and gentlemen, I am very glad that Mr. Butcher brought forth that this came to light when Mr. [141] Jenkins of the Alaskan Native Service went to this young girl. I don't know if you would prefer for her to lie at that time or not but the girl did not come up to him or to Mr. Butcher himself. Now, if the investigator goes to her and asks her, what else can she say? It was not the girl coming up, as he would have this

picture painted, and trying to extract money out of him, going to get him in trouble. Frankly, I do not see anything wrong with this young girl asking Mr. Glenn for $10.00. It seems as though she must have earned it; she must have done $10.00 worth of house work for the period she was out there. She must have been entitled to a little money out of this unless her reward was in other ways.

You have noticed the appearance of all of these witnesses on the stand and you have noticed the inconsistencies. You heard Eva Nickita testify as to the mouth and you heard her testify as to the anus. Now, counsel said there was no evidence of the anus and the penis—of the penis in the anus. Now, I do not know how they could ever feel there was insufficient evidence on that when the poor girl had to get up, turn her rear to this jury, everybody in the court, and put her hand back there. Now, Mr. Butcher said her hand was right here. I don't intend to put my hand where. You folks all know where she put her hand and even to go further, he said there was no evidence of a penetration. The girl just before that didn't know what a penis was and everybody made me go into more detail [142] to bring forth all this and there was testimony as to what was between his legs and hanging down and went in her anus. And they tell me there was insufficient evidence. It is beyond me how they can even say anything like that. This defendant has denied it and said, no, he didn't do that, didn't put my mouth there and didn't do what Count III says I did. He has denied it in court but over

in the jail, you know how people get to talking, possibly people that would do something like that are generally the type that will brag about it. Mr. Butcher was talking about this proposition. Mr. Shaw, I believe, said where could they go in the big room. That might have been the reason why he was telling the witness Glasscock about this in this case, it just might be the reason he was telling about it. I don't know why. You have seen where he was contradicted in several ways, even his own witnesses have contradicted each other. They keep talking about why the girl didn't come in here until two years later. Frankly, she might not have known it was a crime and she certainly wouldn't have been doing this for the threat of $10.00. When they talked about the letter—now how could there have been any such thing as that if it did not come out until the criminal investigator for the Alaskan Native Service goes to her. Counsel for the defendant brought that out right in front of you, talked about it, so that would have to do away with any of these threats for the $10.00. I think you can tell a witness who is telling the [143] truth. You are the judges of that as to whether a witness is lying or telling the truth.

Now, I want you to take into consideration what interest does Miss Nickita have in this trial? What is she going to gain? What is Mr. Glasscock going to gain? I don't think Mr. Glasscock would have any particular love for an office that had put him in prison unless he certainly wanted to tell the truth. The District Attorney's office has no control

over a prisoner once he is sentenced; everyone knows that; that is common knowledge. You could not say that we had done him a favor by putting him in prison. He is a young boy, his first offense, as he has so testified to. Then you heard Minnie Nelson take the stand. She was caught in many inconsistencies and they were even talking about what she said little Eva said when she returned from Mr. Glenn's house. Now, I believe if you will remember and check the testimony that she said that Eva Nickita did not return to her house but returned to Eva's own sister's house. She herself said that and she says this about the ring and everything else. She cannot remember all of her convictions. She said that Eva was dresed and then before that, just before that, she said, no, they were all asleep. Now, I do not know how you could put any weight or credence to that evidence and on top of that it did not even go to the testimony, other than to say that the girl went voluntarily, and yet, the defendant testified that he heard Minnie Nelson say, [144] Eva, put your clothes on, we don't want you here. So the girl went voluntarily. I just do not see how you can put any credence in any such testimony as that. Then the defendant took the stand. Now, what interest does he have in the outcome of all this? Take that into consideration and then you heard the character witness take the stand, one character witness said he had a good reputation there but Benedict Arnold at the time he was convicted could have probably produced thousand of character witnesses. He was a great

man but a character witness of good character is not of too much value nor do I consider a good character witness of a poor reputation of too much value. I think it is better than someone saying it is good but that is for you folks to decide.

Ladies and gentlemen, I have confidence that you will find this defendant guilty as charged. Thank you.

(Whereupon, the court reads the instructions to the Jury.)

The Court: Any exceptions?

(Whereupon, counsel for plaintiff and counsel for defendant, together with the reporter, approach the bench and the following proceedings were had out of the hearing of the jury.)

Mr. Butcher: I except to the court's failure to accept and include among the instructions the proposed instruction of the defendant regarding the definition of the "crime of sodomy." I also take exception to Instruction No. 4 on the grounds that the presumption of innocence applies both to the innocent and guilty until such person is proved guilty and is not restricted to innocent persons and is an incorrect statement of the law on the subject. That is all, your honor.

(Whereupon, counsel for plaintiff and counsel for defendant, together with the reporter, return to their respective seats in the courtroom and the following proceedings were had before the court and jury:)

The Court: The bailiffs may be sworn.

(Whereupon, the Deputy Clerk swears Thomas Merton and C. J. McKinney, as bailiffs in charge of the trial jury.)

The Court: The jury will now retire to the jury room to deliberate on a verdict in charge of the bailiffs.

(Whereupon, the trial jury in charge of the bailiffs above-named retired to the jury room.)

(September 24, 1953, 3:22 o'clock p.m.) [146]

Whereupon, at 10:00 o'clock a.m., September 25, 1953, the trial jury in charge of their sworn bailiffs, Thomas Merton and C. J. McKinney, return to the courtroom and the following proceedings were had:

The Court: Ladies and gentlemen of the jury, have you reached a verdict?

The Foreman: Yes, your honor.

The Court: If so, you may hand it to the bailiff.

(Whereupon, the Foreman hands the verdict to the bailiff, the bailiff hands it to the court, and the court hands the verdict to the Deputy Clerk with the instructions that the verdict be read:)

Deputy Clerk: In the U. S. District Court for the District of Alaska, Division No. Three at Anchorage.

[Title of Cause.]

We, the Jury, duly impanelled and sworn to try the above-entitled cause, find the defendant guilty

as charged in Count I of the indictment and not guilty as charged in Count II of the indictment.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

/s/ David L. Crusey, Foreman." [149]

[Endorsed]: Filed February 5, 1954.

[Endorsed]: No. 14230. United States Court of Appeals for the Ninth Circuit. Theodore Roosevelt Glenn, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: February 10, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14230

THEODORE ROOSEVELT GLENN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

Pursuant to Rule 75 of the Rules of Civil Procedure as applicable in appeals from conviction under Federal Rules of Criminal Procedure, defendant-appellant hereby states the points on which he intends to rely on his appeal from the final Judgment herein as follows:

(1) The Court erred in denying the defendant's Motion for Acquittal, made at the time the government rested its case.

(2) The verdict is contrary to the weight of the evidence.

(3) The verdict is not supported by substantial evidence, and the testimony of the complaining witness is not corroborated.

(4) The Court erred in refusing to allow the defendant to cross-examine the complaining witness on incidents of previous unchastity with other persons.

(5) The Court erred in refusing to permit the defendant to cross-examine the complaining witness as to previous false statements made to the Grand Jury and other persons regarding her age.

(6) The Court erred in permitting the witness, Glasscock, to testify of other offenses occurring since the defendant was indicted.

(7) The Court erred in permitting the District Attorney to elicit from the witness, Glasscock, in the presence of the jury, reference to the crime of "murder", on which the defendant has been previously indicted and on which he has not stood trial.

(8) The Court erred in denying defendant's motion for a mis-trial.

(9) The Court erred in instructing the jury as charged in Instruction No. IV.

(10) The Court erred in permitting the prosecuting attorney, in his closing argument, to refer to other offenses not in evidence.

(11) The refusal of the Court to exclude from the courtroom, on the timely motion of defendant's counsel, all witnesses who were called to testify on behalf of the government.

/s/ HAROLD J BUTCHER,
Attorneys for Defendant-Appellant

[Endorsed]: Filed Apr. 26, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75 of the Rules of Civil Procedure as applicable in appeals from conviction under Federal Rules of Criminal Procedure, the defendant-appellant hereby designates for the record on appeal the entire record from the Indictment to the Judgment of Conviction and Sentence.

/s/ HAROLD J. BUTCHER,
Of Attorneys for Appellant

[Endorsed]: Filed Apr. 26, 1954. Paul P. O'Brien, Clerk.